# MAJORITARIANISM IN INDIA

## ROOTS AND CONSEQUENCES

JAVED GAYA

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# INTRODUCTION

## MAJORITARIANISM IN INDIA ROOTS AND CONSEQUENCES

The theme of this book explores the skewed version of nationalism that has emerged and captured the national narrative in such an extraordinary way that one cannot escape it in contemporary India. It is ubiquitous, in that one cannot turn on the television, read a newspaper, expose oneself to social media or indeed traverse an urban centre without seeing signs and images pullulating all over, bearing the visage of the Prime Minister, accompanied by some trope symbolising national pride. The obverse of such national pride is hatred of the other and that also is unfortunately all too pervasive, and apparent with the rampant Islamophobia in evidence. One sees that in the cinema where films which extoll patriotism and courage in warfare score well at the box office and TV channels which toe a passionately Islamophobic and anti-liberal narrative to earn huge TRPs. Is this version of nationalism new or did it arise from the recent past? What are its consequences? What is its history and where does one locate its geography? These, I think, are relevant questions to ask.

It is at this point one recalls an earlier configuration of an architecture of hate that was documented by the French philosopher, Julien Benda, who in his famous work *La Trahison des Clercs* observed, "Our age is indeed the age of the intellectual organisation of political

hatreds. It will be one of its chief claims to notice in the moral history of humanity." Benda was writing in the 1920s and was profoundly disturbed by what he saw as the retreat from the universal values of the enlightenment to what he considered the valorisation of various particularisms not dissimilar to the growth of identity politics in India and the attempt to vacate a Constitution founded substantially on such values. But his angst was directed against the intellectuals who he felt should give moral guidance, but were now instrumental in whipping up nationalist frenzies which he correctly predicted would lead to the "greatest and most perfect war ever seen in the world."[1] This was highly prescient as it predicted the Second World War, a war that led to the Holocaust and the explosion of the first nuclear device on Japan.

I raise the issue of earlier times to place this nationalism in its context as most of the institutions conceived were done so at that period. Hatred, as Gandhi in his famous essay, *Is Hatred Essential for Nationalism?,* repudiates that this is essential to nationalism. He states that: "We see that this song of hate has not benefited humanity. Let it be the privilege of India to turn a new leaf and set a lesson to the world."[2] Indeed, the liberal nationalism of the late nineteenth century spoke of Constitutional reforms and was not in any manner xenophobic. Ranade and Gokhale were keen on national regeneration through social reform. Even those who advocated violence against the colonial rulers such as Bhagat Singh's nationalism were not jingoistic. According to S. Irfan Habib, "it was embedded in the idea of progress where there is scope for criticism, disbelief and the capacity to question everything of the old faith."[3] Certainly if Bhagat Singh was alive, he would be appalled at this toxic nationalism and Islamophobia.

It is the argument of this book that the origin of much of the hatred that is now apparent owes itself to an ideology that created the Partition located in the United Provinces (Uttar Pradesh—UP), the failure of the Hindu Right to agree to the scope of cultural space to be ceded to the minorities. The consequence of Partition being the elevation of the 'cow belt' as the political fulcrum of India, occupying the centre stage. It has been UP that has redefined Indian nationalism in its image as it seeks to project itself as the simulacrum of India.

The 2024 elections in some respects altered little as the North-South fissures continue as does the marginalisation of minorities.

The arguments for this nationalism are dependent on the most assiduous of myth-making. I say myth-making, as what is often the dynamic of the nationalisms prevalent in the sub-continent and what sustains them, is not history but, in fact, a carefully curated mythology which seeks to dignify them with the vestiges of intellectual respectability. It is, of course, a trite proposition that all nationalisms are, in the words of Ernest Gellner, "a myth; nationalism which sometimes takes pre-existing cultures and turns them into nations, sometime invents them and often obliterates pre-existing cultures: that is the reality".[4] Nationalisms, thus, invariably predate nations and a mythical golden age is often conjured as a fig leaf to hide an opportunistic nationalist agenda which is self-serving for those in power.

The *idee fixe* of seeking to impose the idea of a homogenised, centralised nation-state in the European sense on a diverse, multi-religious, multi-ethnic and variegated society was one which seduced the first generation of politicians with the promise of equality and liberty. This schema has morphed into a virulent nationalism, an intellectual *cul de sac*, compelling the government to use all the instruments of imperial power, sedition laws, restriction on assembly and freedom of speech to impose its puissance. In this process, the idealism of the Left and the liberals has long been discarded, and the narrowness, parochialism, cultural aridity and faux religiosity of the Hindu Right have been elevated and valorised as integral to this nationalism. With this elevation comes forth the cultural baggage of the past; caste and communal antagonisms, exacerbated by the geographical configuration of India post-Partition, which now engenders toxic politics.

I think it is instructive to recall an earlier expansive and heady cosmopolitanism which transcended these narrow nationalistic projects, as Seneca put it, "to measure the boundaries of our State by the sun."[5] I consider that this idea of an abiding humanity and a cultural capaciousness is being diminished and lost to a nationalism insistent on denying not just history and cultural plurality, but the very essence of politics. This is a dangerous fixation as Daniel Patrick Moynihan,

the former US Senator, observed, "The central conservative truth is that it is culture, not politics, that determines the success of a society. The central liberal truth is that politics can change a culture and save it from itself." Indian civilisation and society in 1947 were mired in a stagnant culture dominated by caste, custom and tradition and needed reform. Freedom was seen by many as the opportunity to transform a society in decay to one aligned with modernity. The idea that transformative politics based on Constitutionalism was the dynamo for social and cultural metamorphosis lay at the heart of the Indian political project in the early years.

In any view, this dynamo for transformation has gone awry and its failure has been catastrophic. The contagion of excessive religiosity and unreason has infected the sub-continent, displacing the values of the Enlightenment which were being embraced and enforced in terms of rights-based legislation, widening substantive entitlements through affirmative action to many who had been deprived of them, even if in a nominally liberal political matrix. I will not say secular because India from its inception has subscribed to a peculiar compromise of a pseudo-secularism which purported to attenuate religiosity and has sought to privilege science and modernity. These were the values derived from the Bengali Renaissance, from Rabindranath Tagore, Raja Ram Mohan Roy and others, although the fetish for science is most identified with Nehru.

The burden of this book is to show how prejudice and ignorance on an epic scale can result in dysfunctional societies and failed states. Pakistan is a striking example of this phenomenon, the 'Muslim Zion'[6], a Frankenstein monster, born of a confessional failure to reach an agreement on the extent of the space to be allocated to minorities for the practice of their cultural and religious right so to treat them as communities with autonomy and agency. I argue that it was this reluctance to share power and afford political space to the minority, with the complicity of the Hindu Right combined with the idealistic jejuneness of the Left in assisting Jinnah in a solution which was unsatisfactory to all parties including himself, that led to the extreme ghettoisation of the Muslims, called Pakistan.

Partition resolved nothing, it only externalised the Hindu-Muslim question, but pointedly did not address its causes. Partition arguably

wrecked a fragile communal equipoise in the sub-continent and was wholly destructive of a federal future. Much of what is wrongly ascribed to Fabian Socialism derives from a pervasive and suffocating statist culture emanating from the 'cow belt'. This was surcharged by a parochial and inward-looking mercantile class, insulated from serious taxation through the device of the Hindu Undivided Family (HUF), which was instrumental in setting an economic agenda to guarantee stagnation and deepening inequalities.

I do not propose to belabour the effects of geography, but in India culture matters, caste matters, religion and language matter, and all this is indissolubly tied in with geography. So, one cannot disregard these factors, particularly the historical role of the 'cow belt' and its malign influence in the recent past and its capacity for destabilising the national narrative by its implacable ideology, sheer size, population and political heft, factors that assume portentous signification in our current scenario. At the time of writing, the 'cow belt' has hijacked the future of India and, by the same token, the sub-continent, and has lured it into the stygian cesspool of casteism and communalism and an unending round of grievance politics, distracting from the real issues of governance. The 2024 elections have shown the limitations of these politics, but this may prove a false dawn. UP continues to be governed by the Chief Minister whose views on minorities are coloured by revanchism and this ideology continues to have traction.

In fact, the matter of the Constitutional arrangements of the electorate comes into sharp relief when you have a large percentage of poor, uneducated people who are susceptible to being swayed by religious sentiments leading to polarisation. This has been an issue from the very inception of the Constitution, regardless of whether equality or freedom prevailed. It has been pointed out incisively by Professor Faisal Devji that whether you have the freedom to practise your religion or you proceed on the principle of equality, where the State seeks to stipulate the equal treatment of religious and racial communities, it is mutually antagonistic. As he argues, there arose a

> Disagreement between those Indians who thought that political liberty should precede social equality and bring it about, and

> others who feared that such a liberty would only perpetuate inequality by empowering majorities and the powerful at the expense of minorities and the powerless. This difference characterised not only the relations between religious communities, primarily Hindus and Muslims, who had been the primary addressees of the Queen's Proclamation, but also came to define those between higher and lower castes as well.[7]

The point that Professor Devji is making is of seminal importance, that political representation in a multi-religious and multi-ethnic people's territory need not be based on the "One man, one vote" mantra, but one that recognises communities, religious, ethnic and linguistic and seeks their empowerment through ensuring representation and opportunity. That may be through separate electorates, Federalism, proportional representation, reserved seats, and any number of devices, to subserve the larger purpose of guaranteeing equality and diversity. At any rate, the purpose would, in the words of Saurabh Kirpal, mean "equality of outcome as opposed to equality of opportunity."[8]

The quest for equality between communities has been displaced by the sedulous consolidation of the majority community through preferential expansion in reservations for jobs and in educational institutions for Other Backward Classes (OBCs). This is particularly evident in UP where there is an audacious experiment afoot to replicate the caste system in reservations. It has the dual advantage of excluding minorities altogether as well as devaluing the worth of reservations for the Scheduled Castes/Tribes. This has been accompanied by the erosion and evisceration of independent institutions and individual rights, although some problematical issues such as preventive detention were integral to the Constitutional arrangements, as were sedition, blasphemy and the power to declare emergencies where Constitutional rights were suspended.

But Constitutional principles matter far less than political expediency. The fact that India adopted a Constitutional democracy with fundamental rights and judicial review was remarkable. At the time the minorities bartered away their special rights and privileges, such as separate electorates and reservation, on the basis that certain fundamental rights would be protected by the Constitution and by

the Courts in the event that the legislatures attempted to infringe upon them. What has happened, however, as will be seen in the course of this book, is that their hopes have been belied and their Constitutional safeguards have foundered.

We have to understand that the Brahmin lobby in the erstwhile United Provinces was unwavering in their desire to largely eradicate the composite culture, even if that meant the denial of Constitutional rights to minorities, relating to language, diet and employment. The insistence on these matters upends the notion of a pluralistic society. Isaiah Berlin, in his famous lectures on 'Two Concepts of Liberty',[9] controversially treats a positive State agenda for social and economic liberties as a potential road to totalitarianism, but lauds the negative liberty of being left alone, of the State not intruding on matters which are judged to be personal, such as what we eat or what we wear. Even this limited notion of liberty has been brutally eviscerated.

Unfortunately, from the earliest period, the Indian Government has shown an incorrigible disregard for people's autonomy to conduct their own lives, treating an ambulatory notion of the hurting of sentiments of other people, which is invariably the majority sentiment, as being the litmus test of acceptability. In a way, this is far more detrimental to civil liberties than even a theocracy, wherein at least you know when you have transgressed the limits. The notion of people's sentiments being hurt is so vague and amorphous that books, opinions, and films can suddenly instigate people to violence, causing public disorder for the flimsiest and facile of reasons.

So, it is not obvious that Constitutional safeguards can be treated as sacrosanct within the current political matrix. A study of the Indian Supreme Court addressing controversial issues such as cow slaughter, the right to convert, and the role of religion in electioneering, as well as the attempt to distinguish what is the essence of religion in determining social practices, gives little hope for minorities in India. In most cases, the views of the Supreme Court invariably align with the majority sentiment.

Francis Fukuyama has argued that national identities can "be built around liberal and democratic values and the common experiences that provide the connective tissue around which diverse communities

can thrive. India, France, Canada and the United States are examples of countries that have tried to do this."[10] One of the objects of politics is to create consensus and unity and in what was described as 'nation building', that goal has been abandoned. As Fukuyama maintains "national identity is built around the legitimacy of this contract; if citizens do not believe they are part of the same polity, the system will not function."[11] Fukuyama in a recent publication now draws a parallel between America during the civil war and Modi's India, stating that the shifting of the national identity to one based on Hinduism is one inviting communal violence.[12] According to Amrita Basu, there is a clear correlation between incidents of communal violence and the ability of Hindu Nationalist organisations to flourish.[13]

It is not as if India has not already contained and ghettoised certain states and stigmatised people as not belonging and alien, areas which are considered as not falling within the perceived mainstream of India such as Kashmir and the North East, but this may just be a harbinger of what is to come. A triumphalist Hindu, Hindi-speaking majority with the political heft to push through a unifying project to reshape India in the simulacrum of UP and Bihar will encounter opposition from the South and the East which have shown unwillingness to cooperate in this schema, and trigger cultural flashpoints which the Nehruvian settlement contained, causing cultural wars similar to those in the US to erupt.

It is curious to note that in one of the most salient and protracted of international conflicts that continues to plague international relations, the Israel-Palestine dispute, the Indian position in 1949 as expressed in the United Nations was that there should be a federal solution with the explicit and legal protection of minority rights within an undivided Palestine, the so-called 'Nehru plan'.[14] Pluralism would have trumped the nationalist obsession. It is regrettable that this attitude was not adopted by the Congress in the 1930s, as we would not have to live within the South Asian reality of a three-state solution.

Federalism is a nomenclature without substance as the centre has misused Constitutional devices to undermine the autonomy of the States, and we appear to be trapped in the colonial stranglehold, which

is obsessed with power for power's sake and not the development of an architecture that enables improving the quality of governance and the distribution of public goods. In many respects, there is much we can learn from China and the autonomy given to local authorities. Instead, the last decade has shown a consistent appropriation of powers from the State to the Centre in an unprecedented fashion. In this respect, the 2024 election is a pushback to this insidious centralisation, the voters of West Bengal, Tamil Nadu and Karnataka have rejected the discriminatory treatment meted out by the Centre and, in general, regional parties have emerged as winners at the cost of the National Democratic Alliance (NDA). This is one silver lining in the recent polls.

The bizarre apathy apparent in political discourse is profoundly worrisome given the fact that the sub-continent is facing serious existential challenges on many fronts, not least in terms of the ravages of climate change, water scarcity, poverty, (in some cases below that of Sub-Saharan Africa) unequal access to education and health, gender discrimination, the unravelling of the rule of law and the choking of the media. Instead of staring at the coming abyss, the people of the sub-continent appear to be transfixed by issues of staggering banality, causing one to question the very basis of the much-vaunted democratic model of governance which we boast about. Unfortunately, the democratic model we have adopted only serves to accentuate this nationalism, as there are no serious checks and balances on executive power.

For one, if we look at the sub-continent, including Bangladesh and Nepal, by 2030 it will house nearly one-third of the world's population. Both India and Pakistan are nuclear powers and it is entirely plausible that we may see an apocalyptic presentiment if these two countries, armed with the latest nuclear technology and wedded to a politics derived from tribalism and medieval constructs, engage in conflict. While this in itself is hugely disturbing, there is a further feature which needs to be considered. The struggle between India and China, another nuclear-armed country, over a serious and seemingly intractable border dispute which has festered for years without any obvious resolution.

The Constitutional arrangements arrived at post-Partition are largely responsible for this predicament that has overtaken the Republic. There was too much faith in Constitutional expedients and centralisation of power to effect social reforms without realising that such centralisation stifled democracy. The Constitution may have paid lip service to the idea of Federalism, but it is in effect unitary in its form and effects. This was, in part, because of Ambedkar's legerdemain, 'the flexible Constitution'. The geographical landscape of the country after Partition privileged the 'cow belt', particularly UP which has given India the maximum number of Prime Ministers. There are few Constitutional safeguards; the Rajya Sabha is only a mirror image of the size of the states, unlike the US where each state has equal representation. The judiciary has been ineffectual in placing any serious check on the Executive. We also have a first-past system of electoral democracy which favours the biggest party at the cost of minority representation. All these factors surcharge an increasingly centralised and authoritarian government and induce a political culture which takes its lead from states such as UP, a process that will be turbocharged by the delimitation if that happens in 2026, where UP will almost double its representation in parliament by reason of the size of its population.

So, India is in danger of being consumed by the past, by the banshees of Partition, of unresolved matters for which only history has the answers, an indomitable refusal to revisit choices made in the 1940s for which we are paying the price today. The Cabinet Mission Plan was the last opportunity to retain a unified India, one that was properly federal. It was repudiated by the Congress with the support of many on the Left. But it is perplexing as to why public intellectuals do not revisit these decisions with the same vigour that the pseudo-intellectuals of the new nationalism do, curating a mythology aligned with the political narrative. Theirs is unfailingly a threnody of humiliation, of manufactured grievances, an elaborate feint and stratagem to deflect from the reality of a society which is grotesque in its social and economic inequalities, where historic vestiges of a sclerotic and suffocating casteism overlap a burgeoning crony plutocracy. The brutal fact is that the richest 1% of Indians are in 2025 as rich, if not richer, than they were in colonial times.

# PART I

# THE ROAD TO PARTITION

1

# THE MYTH OF ETERNAL INDIA

The attempt to impose a civilisational basis on a territorial State is always fraught with difficulties, and unfortunately, there has been an insistence both by the Nehruvian thinkers and the protagonists of Hindutva to assume the existence of this civilisational basis for the State; the former with inclusivity, the latter with a desire to sanitise the civilisation on the basis of religion. So, to sustain this fantasy, myths have to be created and history re-written. In this process of seeking to replicate the Western paragon of a nation-state, aspects of what one can call the Indic civilisation get lost, such as the huge and enduring impact it had on South East Asia where many overtly Hindu festivals and ceremonies still have relevance in such countries as Thailand and Indonesia.

Partha Chatterjee makes a seminal distinction between States and Nations. He argues that the Mauryas, the Guptas, and the Mughals were States as they were "held together by military force and tribute-paying arrangements" whereas a Nation exists and develops by its people. It is the very notion of the sovereignty of the people that defines the Nation. This does not necessarily mean that only democracies can be nations, but that the locus of validation and legitimacy must indubitably be popular consent. Chatterjee puts it succinctly, "Without the claim to popular sovereignty, there can be

no nation-state or *Rashtra*. Therefore, all nations are modern."[1] This argument confronts the former about a civilisational state, making the point that it is superfluous to nationhood.

In actual fact, British India itself was a colonial project involving certain arbitrariness in the delineation of the boundaries of the State, which meant that there was no obvious cultural or civilisational cohesion in the same way as the nation-states of Europe, such as England, France and Spain. There had been large concessions to the Princely States of India with some 562 States[2] constituting nearly one-third of the geographical area of India. These states remained outside British India but still accepted the paramountcy of the Crown. It was not obvious that such disparate areas would necessarily want to join the nationalist project and that the rulers of such Princely States would be willing to concede their sovereignty to the popular will and merge with the Constitutional democracy that was to become India.

So, if this desire for nationhood eclipsed any close approximation of a distinct civilisation or territory, the very idea of India which nationalists wrote about in the most sentimental and roseate language was inchoate. In *A Nation Calling for a Home*,[3] Dr. B.R. Ambedkar opens a paragraph meditating on the shame the Hindu would feel if India was not a nation. He states,

> In a world where nationality and nationalism were deemed to be special virtues in a people, it is quite natural for the Hindu to feel… that it would be improper for India to be without a nationality as it would be for a man to be without clothes in a crowded assembly.

He elegantly points out that nationalism predates nations and how it was a necessary construct in the twentieth century. Salman Rushdie, in *Midnight's Children*, described the India of 1947 as the new myth of the year of Independence, "a mythical land, a country which will never exist except by the efforts of a phenomenal collective will—except in a dream we all agreed to dream." This may sound extravagantly whimsical, but in the light of Ambedkar's insightful pronouncement, it is very apposite. Self-determination was the prevailing credo and such self-determination was confused with cultural nationalism.

The problem really arises when there is an attempt to give substance and credence to the idea of an ancient eternal India as a nation-state. The very term 'India' derives from the Arabic term 'Hind' which in turn derives from the narrower term 'Sindh' which in Sanskrit means 'frontier'. But, in fact, there were no clear delineations as to the territorial limits of 'Hind'. Sanjay Subrahmanyam identifies the issue which most nationalists seem to peddle stating that "the notion that at some distant point in the past, say about AD 500, the concept of 'Indian civilisation' had already been perfected. Everything of any importance was in place: social structure, philosophy, the major literary works."[4] So, if civilisation was well in place, it was a small step to suggest that Indian civilisation amounted to a nation-state. This, at least, is what the nationalists subscribe to, including Nehru in *The Discovery of India*. [5] This idea of ancient India, *Bharatvarsha,* and its inhabitants have come under scrutiny from a serious historian who has examined many of the ancient texts and inscriptions only to extirpate this fallacy of an eternal India.

## *The Borders of a 'Bharatvarsha'*

In *The Concept of Bharatavarsha*[6] by Professor B.D. Chattopadhyaya, the idea of a *Bharatvarsha* is deconstructed with references to ancient texts and inscriptions as well as to rudimentary geographical concepts. Chattopadhyaya concludes that the terms *Swadesa* (one's own country) or *Videsa* (a foreign country) would be of no relevance in the context of *Bharatvarsha*. The notions of a border or a frontier were absent as, historically, there was no serious distinction between outsiders and local inhabitants. Chattopadhyaya concludes "that the major divide in Indian society was perceived through the angle of *Varna* (caste) which made the all-important difference between those within it and those without it." It is all too easy to superimpose Western geographical and political concepts retrospectively, and for the sake of convenience, ignore what was relevant to the people of the time. The renowned historian of Indian nationalism, Sir Christopher Bayly, understood the Hindu conceptualisation of geography to mean that *Bharatvarsha* was a 'sacred space'; it was emphatically not a territorial region with defined borders as is now widely assumed.

These assumptions persisted well into the nineteenth century. One of the signal signs of a sense of robust nationhood is the attitude to foreigners or people, not of the territory which was never the case until relatively recently. Professor Faisal Devji, writing on the Great Uprising in 1857 stated that:

> The English therefore do not seem to have been disliked for being foreigners at all, but only for breaking the moral compact that defined India as an empire of distinctions.[7]

The point being that being the Imperial push for proselytism was seen as objectionable by the Hindus and Muslims alike and in doing so they had crossed a line.

The true value of Chattopadhyaya's book, however, is how he interrogates the issue which forms the bedrock of much nationalist thinking: that ancient India approximated to a civilisational State. This was clearly the understanding of both Gandhi and Nehru. This was a convenient argument. It had the virtue of neatly sidestepping the controversial fact of medieval India and the Muslim conquests, as what was represented was a historic continuum which had been etiolated by the ravages of the Middle Ages and colonialism, but had now the opportunity to regenerate itself in the sunlight of freedom.

Chattopadhyaya is, however, dismissive of this single political construct of India and presents an analysis of regional cultures and how they came about. As he puts it, "Modern regions like Bengal, Maharashtra or Rajasthan would not have existed throughout Indian history. Historical evidence and perspective therefore demand that we look for processes that went into the making of regions and the particular characteristics associated with them."[8] He manifestly repudiates the construct of a superstructure and remarks that "the perspective of looking at Indian civilisational entity from above will be turned upside down, and the effort should be made to look for the historical processes involved in making of the large entity rather than widely distributed sites of diversity as all derived from one tradition."[9] Sanjay Subrahmanyam further explicates this and talks of a new homogeneity being founded in the early nineteenth century, attributing it largely to Western Orientalists. In this context, the work

of William Jones and H.T. Colebrooke is also relevant as they sought to establish an overarching common origin of civilisations. As Dilip Menon remarks, "It was in the Sanskrit texts that the real genius of India's Hindu past was looked for and not in the multitude of Hindu religious practices".[10] To this extent, other popular Indian cultures which had strong roots in regions such as Bengal and Andhra Pradesh were discarded in favour of this fetish with high Brahmanical culture. As Savarkar put it, there was a "process of assimilation, elimination and consolidation,"[11] adumbrating what we call Hinduism.

It would not be incorrect to assume that many of these territories, such as Bengal, Orissa, Rajasthan, and Andhra, had distinct languages, histories, and cultural traditions divergent from each other and would have had the basis to be regarded as independent sovereign entities, but for the colonial intervention. These facts sustain the argument that the normative position for a loose federal structure was very much in place post-Moghul rule and the perception of eternal India as a single political construct, in the same way as Imperial China became under the Qing dynasty, is baseless and illusory.

2

# THE COLONIAL STATE AND THE SACRED SPACE

It is thus necessary to question the paradigm of eternal India; at least as a territorial State in the Weberian sense prior to British rule. It is true that the Mughals left behind a compelling legacy of cultural and institutional cohesion which Richard Eaton describes as being to co-opt the political authority of the Caliph, embrace the principle of universal justice and accommodate cultural diversity.[1] But it was the British who built on that foundation and located political authority within the matrix of a sovereign centralised structure, and significantly, within territorial boundaries. This process of drawing territorial boundaries by the British was, as Matthew Edney states,[2] an indubitably British exercise, placing their imperial interest as of paramount concern without any regard to Indian culture or religious sensibilities.

The British notion of a border in these colonial territories was very different from what it was back home. That arch imperialist and Viceroy, Lord Curzon, was dismissive of the notion that India had any natural frontiers and that was consistent with his dismissal of an Indian nationality. In his Romanes Lecture, *Frontiers*, at Oxford University in 1907, he adumbrated the imperial frontiers as consisting of three layers. The first was administrative in nature. The second was the frontier of active protection. The third was an

outer or strategic frontier. It was only within the administrative layer that the normative activities of a modern State occurred, such as the granting of property rights, their registration and protection, and the legal and administrative paraphernalia that is associated with the infrastructure of the State.

The drawing of these borders represented the grudging recognition of tribal rights by the colonial powers who would treat these areas as zones of native protection, occasionally enforce their sovereignty through random military expeditions, but largely leave the tribals to themselves. This was certainly the case in the tribal areas of Assam as well as the area between Baluchistan and Kashmir, what is known as the North Western tribal areas.

If one were to go back in history, there are of course rulers and dynasties which had dominion over large parts of North India (which would include Pakistan). The Mauryans, the Guptas, and the Mughals conquered the South up to the Deccan and the East to the extent of a border with Siam. But it was the British who exercised the widest sovereignty and legislated this in 1899, by sedulously transforming what had been a mere cultural adjective into a bounded territory. This putative nation's borders approximated pre-Partition India in large measure. For instance, the British annexed Assam in 1826 by defeating Burma and forcing the Treaty of Yandabo on the defeated Burmese.

Much of what we now call Arunachal Pradesh, including Tawang, is contested territory because of British incursions into Tibet and the Chinese claim that Tibet was ruled by China at the time of the Qing Dynasty, which is as plausible an argument as that India is able to claim Afghanistan because it was once ruled by Maharaja Ranjit Singh.

Over these territories which became part of independent India and Pakistan, the immediate concern of the Governments was the desire to stamp the imprimatur of sovereignty on these lands.

Atul Mishra, writing on the fruits of Partition and the creation of the two States which appear to be transfixed by the chimera of sovereignty, a need which is perpetual because it can never be satiated, argues that the quest for sovereignty becomes 'an end in itself.'[3] Sovereignty is not sought to be justified or validated by

reference to the common good, in terms of better governance or more public goods. It is something which de-prioritises the people, making them irrelevant to what is essentially and avowedly a statist trajectory which demands unquestioning loyalty and obeisance. In doing so, by removing people and their quotidian needs from the equation of governance, there is no requirement for accountability. The fetish of territory disregards the people. We have already seen an example of this in Kashmir where for the sake of a largely symbolic gesture—the abolition of Article 370—a whole population in the Valley had been incarcerated and denied the benefits of the internet, amongst other facilities, for over a year without any persuasive reason.

In the other nation, Pakistan, the sovereignty argument is easy to spin as the threat to Pakistan from India is routinely trumpeted by the military and the media, even when the recent past has only shown the Pakistani army and its surrogates to be the aggressors. The army has become the biggest beneficiary of this pervasive siege mentality, cornering power and land and controlling the narrative on foreign and defence policies. We also see the validatory role of religious zealots and entrepreneurs seeking to confer divine sanction to this deep State. No lessons have been learned from the policy towards East Pakistan, which resulted in the third Partition of Bengal, as presently the Pakistan army appears to be imposing its writ in the most brutal manner in Baluchistan. In the meanwhile, huge resources needed for public welfare, health and education are diverted to feed this obsessive fetish of protecting territory.

The apogee of the territorialisation argument of India's sacred space is, according to Atul Mishra,

> The iconography of '*Bharat Mata* or Mother India' produced through the divinisation and feminisation of the modern cartographic depiction of India. Superimposed on a modern map of India, the feminine and divine figure encompasses the entirety of India's expansive space… it is the ultimate statement of a unified and organic sacred geography that needs to be jealously guarded by the children of the divine figure, who naturally belong to the majority religion.[4]

The sequitur of this is that the minorities are pointedly excluded from what is evoked as a sacred geographical configuration. The use of a Goddess as emblematic of the territory is adroit as it summons a primeval symbolism redolent of sacrality, making the protection of such territory the sacred duty of the sons of the soil, treating any interloper with the same brutality one would a hapless perpetrator of '*love jihad*'.

This disturbing iconography is confronted by the studied ambiguity of the nature of the Pakistani State which is at once a political entity as well as a religious one, reflecting the tension between those who envisaged Pakistan as the homeland for the Muslims of India and those who audaciously saw it as an ideological beacon for the *ummah* (the faithful), for a Muslim Zion which is not constrained by borders. Territory is seen as addressing that most existential question of the State: its identity, an issue which emerged in sharp relief after 1971 with the collapse of the two-nation ideology. Mohammed Ayoob puts it succinctly "Pakistan's inability to shed its Indian geopolitical, cultural and Islamic identity has forced it to adopt anti-Indian postures in order to differentiate itself from the mother country. It is its inability to define itself without reference to India that lies at the base of Pakistan's hostility to India."[5] Simply put, a nation which has existential crises of identity will not just suffer perennial domestic instability, but this will inevitably spill over to its foreign policy, making it a rogue State, unpredictable even for its principals such as the United States and, now, China.

The notion of sovereignty carries a further burden in the Indian context and that is the sense of the 'sacred spaces' which the Hindus traditionally regard as forming part of this sacred geographical configuration. Although, in the North East, there is little in terms of Hindu 'sacred spaces', the very principle of territorial integrity trumps everything. Christophe Jaffrelot draws an eerie parallel between Israel's notion of the sacred land of the Jews with India being the *punyabhumi* of the Hindus.[6]

The outcomes of conflating what were patently colonial constructs as the 'sacred spaces' of Indian territory particularly *qua* China has been commented upon by the Chinese who have expressed

displeasure at India's attempt to present itself as the legatee of the British on what they conceive as imposed boundaries.

What the Indians do not quite appreciate is how the Middle Kingdom—a term the Chinese like to use to describe their country—view this fusion of the colonial past, the icy hauteur of Lord Curzon with the Indian present, the dissembling oleaginous charm of Narendra Modi with great distaste. For the Chinese, the colonial period was one of unalloyed shame and for the Indian State to treat these colonial borders, that they see as imposed on them by the 'White Devils', as sacrosanct and inviolable is itself deeply provocative. The basis of this provocation is historical. It has to be seen in the context of the opium wars, the role of the Indian mercantile communities as facilitators in this squalid trade and, more of an affront, the brutal actions of Indian soldiers under the command of British officers in the appalling sacking of the Forbidden City, something indelibly etched in the collective memory of Chinese society. [7]

From what I understand from one of the last surviving members of the meetings held between V.K. Krishna Menon and Zhou Enlai, India was practically on the cusp of a border settlement with China in 1959. According to Shiv Shankar Menon, at the 6th Meeting, "Zhou said that if India would recognise the line up to which Chinese administration had reached, China would recognise the Indian administrative line in the eastern sector."[8] This would have been the most practical resolution of this border dispute, but Nehru was opposed in Cabinet by Pant and others. When the matter of Nehru's China Policy came up for debate in Parliament, it was to his surprise that perfectly rational people like Chakravarti Rajagopalachari and Minoo Masani, along with the Leftists like Ashok Mehta and Ram Manohar Lohia, excoriated any peace plan with China which involved giving up territory.[9] As Mohammed Ayoob stated, "The 1962 war was forced upon Nehru by an ill-informed and jingoistic opposition and public opinion posed a major challenge to his foreign policy." No one could see the utter folly in the strategy as it worked against India in many ways, not in the least driving China into the arms of Pakistan and vice versa. Apart from a disastrous Indo-China war in 1962, there have been continuous skirmishes at the border,

with India now facing two enemies, making it logistically harder to defend territory.

As a matter of priorities, it is a moot point to ask whether it makes sense to scale up hostilities in an area which Nehru famously described as one 'where the grass does not grow.' For China, it is a no-brainer to tie down its largest potential Asian rival in a pointless hostility, diverting important resources from productive use to inflate the defence budget. This fetish with physical borders and their protection is a rather quaint conceit in an era of AI, drones, etc., where an enemy can degrade its opponent virtually through bringing down power systems without any physical intrusion.

In this context, it is pertinent to cite Robert Kaplan when he describes the historical context of the current China-India predicament,

> The sub-continent is a blunt geographical fact, but defining its borders will go on indefinitely… whereas Chinese dynasties of old almost completely fall within the current borders of China. The dynasty to which India is heir to, as we have seen, does not. Thus, India looks to Afghanistan and its other shadow zones with less serenity than does China to its shadow zones. India is a regional power to the degree that it is entrapped by this geography. It is a potential great power to the degree that it can move beyond it[10]

This correctly summarises India's dilemma. My point, thus, is that this new nationalism subsumes and appropriates terms and tropes of the sacred space and extrapolates it into a nineteenth-century European construct of the nation-state, to give legitimacy to arbitrary colonial boundaries which have and will continue to be persisting sources of argument, angst and conflict.

3

# THE COLONIAL STATE AND MINORITY RIGHTS

One of the consequences of appropriating the colonial borders and applying them to a modern nation-state is that much of the populations that come within these borders were not going to be of the same racial stock, speak the same language or share the same religion as the majority of the population. The colonial rulers recognised this and sought to retain traditional structures of governance and customary law in these territories.

It is in this context that group rights come into focus, particularly the rights of religious and ethnic minorities, as a democratic polity would view such rights differently from a colonial ruler. It is this paradox, the mythology of a civilisational State imposed upon an imperial territory, that has led to such confusion as to the nature of minority rights and goes to the heart of what constitutes national identity.

There were many minorities in Colonial India, but I make no apologies for focusing on the Muslims as being a substantial minority, 25% and one which represented the most complex and intractable of problems to the Nationalist Movement. The Muslims of North India looked with the most foreboding to their future in a democratic India as was evident by the politics of Sir Syed Ahmed and the Aligarh Movement.

To understand minority rights in India now, it is important to consider the issue of representation in colonial times and the manner in which minority rights were protected through various stratagems and devices. This included reservations, such as a fixed number of seats in legislatures, separate electorates whereby the electorates were demarcated on a religious or community basis and giving religious minorities a higher weightage in legislative bodies than their numbers warranted. For example, in the Bombay Legislative Council, the Muslims had 29.6% of the seats when their population was only around 20%.[1] These were undoubtedly controversial policies, such as separate electorates as only Muslims could vote for Muslim candidates. The colonial government was minded to extend this policy to what was termed the 'depressed classes'. In 1927, the Simon Commission was established to explore the extension of separate electorates. Although boycotted by the Congress, Dr. Ambedkar participated in its deliberations, arguing that there was merit in reserving government jobs for the depressed classes.

Whilst it is fashionable to cite the colonial rulers' considerations, namely the much-vilified 'divide and rule' policy, Abhinav Chandrachud, in the *Republic of Religion*[2] refers to secularism being a factor. There was always the concern of the majority trampling on the rights of the minority, particularly with the growth of religious evangelicalism amongst Hindus and Muslims at the time. The origin of these representation policies, particularly the separate electorates was introduced by the India Councils Act, 1909. It is at this point that the hoary 'divide and rule' argument is often raised, but as H.M. Seervai sagely observed, "there was an element of truth in this; but a legislative provision may be desirable, or necessary, independently of the motive which originally led to its enactment."[3]

### *Separate Electorates*

It was putative nationalism that led the Hindu Right to view separate electorates as a source of future antagonism and disaffection. This was certainly the view of Sardar Patel and echoed in a report published in 1937, written by Rajendra Prasad and Govind Vallabh Pant.[4] The reason these gentlemen rejected separate electorates was much more

mundane. It was because it presented difficulties to the Congress Party in Muslim constituencies. It never seemed to occur to these worthies that perhaps a more inclusive agenda would win over the Muslims, but the Congress in UP and Bihar were unfortunately held hostage to the majoritarian thinking of Pant, Madan Mohan Malviya and others. This was the crux of the problem.

Dr. Ambedkar, however, was able to provide a much-needed corrective to this nationalistic prejudice and bigotry. He gave the example of the Sikhs who despite enjoying separate electorates could not be accused of being 'anti-national'.[5] He even went as far as furnishing the example of Mohammad Ali Jinnah who was a product of separate electorates but which did not prevent him in his earlier avatar from espousing a formidable nationalistic ethos. Therefore, he argued, it was neither obvious nor inevitable that the device of separate electorates would lead to anti-nationalism or disaffection.[6]

### *The Nehru Report and the Pakistan Resolution*

Mohammad Ali Jinnah had raised various issues as a means of opening a dialogue with the Congress with a view to strengthen the nationalist effort. In 1927, with great efforts, he managed to persuade the Muslim League to jettison separate electorates in exchange for a fixed one-third share of seats in the Central Legislative Assembly. He also sought to propose the separation of Sindh from the erstwhile Bombay Presidency in order to establish a new Muslim-majority province.

In 1928, there was an attempt to resolve party differences on the question of minority representation in what was termed the Nehru Report, authored by Motilal Nehru, Jawaharlal's father. The Nehru Report made several important proposals in relation to the Hindu-Muslim question. It essentially substituted the controversial matter of separate electorates with reserved seats for Muslims which were to be given in proportion to their numbers and not on the basis of a principle of representation such as the one-third share, which is what Jinnah insisted. This represented a setback to the Muslims and was a marked departure from the conviviality of the Lucknow Pact of 1916. As Joya Chatterji put it, "Demos was the

way the Congress was going, with no safeguards for minorities, it seemed. Jawaharlal's fingerprints were all over the Nehru Report—indeed, Nehru Senior acknowledged his son's contribution to the proceedings."[7] This was one of the first signs of Congress showing its fangs in relation to the position of Muslim representation, and it led to a rift in the relationship between Jawaharlal Nehru and Jinnah. Jinnah responded with 14 points[8] under which an agreement could be devised which included effective representation of minorities and one-third representation of Muslims in all cabinets but fundamentally predicated on a federal structure with residuary powers with the States. The Congress did not accept this and Jinnah described it as a parting of the ways for India's Hindus and Muslims. His exact words were "If you cannot agree, let us at any rate agree to differ, but let us part as friends. Believe me there is no progress of India until the Musalmans and Hindus are united, and let no logic, philosophy or squabble stand in the way of coming to a compromise and nothing will make me more happy than to see a Hindu-Muslim union."[9]

The inability of the Nehrus to comprehend the cultural underpinnings of nationalism had a major influence on their pivotal dialogue with Jinnah. Jawaharlal repeatedly brought up the class angle, and given Jinnah's friendship and support from the Muslim aristocracy and business community who funded the League, as well as his predilection for Savile Row suits and his signature monocle, this charge struck home. Having said that, Jinnah had every right to view Nehru's invocation of class politics as hugely hypocritical given the nature of the composition of the Congress Party, which, at least in its heartland, UP, had a Brahmin and upper caste hegemony. The Congress was funded by an avowedly Hindu business class who, whilst paying lip service to national unity, had an overweening desire to diminish if not eradicate much of the Muslim cultural legacy in North India and substitute it with a confessionally Hindu Brahmanical paradigm,[10] involving the prohibition of cow slaughter and mandating the *Devanagari* script and what is called "*shudh* Hindi". This position was no secret and was fairly acknowledged by the Mahatma in the 1931 Karachi Congress session in which he drew a distinction between the Aryan Hindu culture and the Persianate Muslim culture which both deserved space, according to him.

However, most of the Congress leadership, particularly from UP, were opposed to this.

In contrast, the British under the Government of India Act, 1935 vested the colonial governments with what was termed a special responsibility of ensuring that the 'legitimate interests of minorities'[11] would be protected in public employment e.g. the Muslims enjoyed 25% of the seats in government jobs, approximating to their population aligning with the Proclamation.

The Congress did exceedingly well in the 1937 elections with the League winning only 109 out of the possible 482 seats and only 5% of Muslim vote. These results laid bare the weakness of the League as a force for mobilising the Muslims, and the Congress used that miserable performance to treat the League as scarcely relevant, Nehru even suggesting that the Muslim League of UP be dissolved and become part of Congress. The reason for raising this issue is to draw attention to the deplorable and unwise post-election treatment of the Muslim minorities particularly in UP, which has been adduced as one of the more compelling reasons behind the passing of the Lahore Resolution, commonly known as the Pakistan Resolution of 1940, by the Muslim League at the Lahore Session.

It is commonly argued that the conduct of the Congress governments which acted in a triumphalist fashion exacerbated Hindu-Muslim tensions. Ian Copland points out that:

> Muslims were justly angered by the additional emphasis on the Hindi language and on Hindu culture and history in Congress-run state schools. Soon anti-Congress sentiment (inflamed, to be sure, by clever League propaganda) was running high among aggrieved Muslim parents, among Muslim professionals who felt that their employment prospects had suffered, and among Muslim businessmen who had watched lucrative government contracts go to Hindu firms with Congress party connections.[12]

This perception is contested by B.R. Nanda who argues that there was "hardly any evidence in the records of the Home Department of the Government of India to support the theory of a Hindu Raj in Congress-governed provinces."[13] It is material that much of what Copland claims was antagonistic would not be recorded by the Home

Department. Whatever may be the case, there may well have been triumphalism and arrogance by provincial Congress leaders which was seen as provocative by the minorities.

One aspect which was particularly offensive to the Muslim minority in UP was the education policy, Dr. Sampurnanand, who was the Education Minister in the Congress Government, according to William Gould, "made no bones in his writing about linking educational ideals to the philosophy of Vedanta and Indian traditions."[14] So, at a practical level, he encouraged the adoption of what was known as the Wardha scheme of education. This education scheme, it was argued by Muslim League politicians, presented a one-sided view of history, and a religious education which emphatically did not address Muslim needs. Around 1,300 primary schools were converted into this Wardha scheme after 1938 and for many Muslims, it was a presentiment of what was to come. Even Right-Wing secular leaders like Minoo Masani excoriated it.

This perception of a Hindu Raj in the guise of Congress-run governments provided grist to the mill for those few Islamist ideologues who sought separation from India. The Lahore Resolution itself needs to be quoted:

> No Constitutional plan will be workable in the country or acceptable to the Muslims unless it is designed on the following basic principles, viz., that geographically contiguous units are demarcated into regions which should be so constituted, with such territorial readjustments as may be necessary, that the areas in which the Muslims are numerically in the majority as the north-western and eastern zones of India should be grouped to constitute 'Independent States' in which the constituent assemblies are autonomous and sovereign.

B.R. Nanda states that the "Pakistan resolution, as it came to be known, gave a new twist to the communal problem. All the solutions hitherto thought of—separate electorates, composite cabinets, reservation of posts—suddenly became out of date."[15] In fact, I think the contrary was the case; it compelled those seriously concerned to consider Constitutional safeguards for the minorities to prevent Partition of the country. It must be stated that the Resolution did not

mention Pakistan or, indeed Partition, save and except the emphasis on territoriality. There is a teasing ambiguity in the wording to give the intimation that this was intended to be a bargaining counter for future discussions for which Jinnah was to be the sole spokesman for his community. Perhaps it almost certainly gave a new dimension to the Hindu-Muslim question as it raised the spectre of a divided India and caused a rethink amongst many as to whether there could be any other Constitutional devices to provide a measure of security to the Muslim minorities rather than risk the Partition of the country, as the Congress had retreated into a reverie of complacency after winning the 1937 elections.

Many observers believe that the failure to address some of the League's demands post the 1937 elections and the insistence particularly by Sardar Patel that the League merge with the Congress in UP, was the cause of future problems. This was the view of H.V. Hodson[16] and Sir Penderel Moon.[17] If the Congress had treated the League with more respect and agreed to some of their terms including the controversial matter of a substantive role for Urdu as a second language, perhaps the Partition could have been forestalled.

UP figures significantly in this episode. The Congress Party was deeply split in UP and if Nehru and Sapru represented the liberal wing of the Congress, open to the preservation of the existing composite culture, politicians like Govind Ballabh Pant, Purushottam Das Tandon and Sarvasi Sampurnanand were insistent on marginalising what they saw as the composite or Muslim culture in UP. But for the freedom struggle, UP was pivotal, and the unity of the Congress trumped everything, even if it was at the cost of the minorities. Nehru tried to justify his indifference to cultural rights by reference to the impetus of modernity, of future differences arising out of economics rather than caste and religion.[18] This quixotic belief in the momentum of modernity, banishing differences of religion and caste in favour of economic and class issues, ignored the ground realities of UP politics which was only fixated on cultural issues. But it was a convenient stratagem to avoid controversy and a potential schism within the Congress in a state in which it held hegemony and was to be the basis for Congress rule for at least three decades after Independence. In fact, what Nehru plainly stated was that "by

virtue of numbers and in other ways, (the majority community) is the dominant community and it is its responsibility not to use its position in any way which may prejudice our secular ideals."[19] So his notion of minority rights was confined only to the security of their culture and their lives. He saw no role for the minorities in government or assured them of any representation in jobs.

Dr. Ambedkar put the point well in *States and Minorities*:

> Unfortunately for the minorities in India, Indian nationalism has developed a new doctrine which may be called the Divine Right of the Majority to rule the minorities according to the wish of the majority. Any claim in the sharing of power by the minority is called communalism while the monopolising of the whole power is called Nationalism.[20]

It is fair to say that this perception of nationalism was also shared by Tagore who excoriated the "organising selfishness of nationalism." Their point is well taken.

### *Desai-Liaquat Pact*

There were several efforts in the 1940s to try and work out an arrangement whereby Muslim rights were protected. One of the first of such attempts was the Desai-Liaquat Ali Pact. This Pact was between Bhulabhai Desai, the President of the Bombay Provincial Congress Committee and Liaquat Ali Khan, the General Secretary of the Muslim League. The Pact attempted to provide a basis between the Hindus and Muslims to form a coalition ministry at the Centre. The principle which animated this Pact was the notion of parity between the Congress and the League as well as the representation of other minorities, including the Scheduled Castes and the Sikhs.

This Pact was signed in November 1945 but foundered when Provincial Governments could not be formed as the Governor General had imposed Section 93 of the 1935 Act (analogous to the President's Rule under Article 356 of the Constitution) on the Provincial Governments. Some have sought to sow doubt as to whether Gandhi was complicit in this Pact. However, Sir

Motilal Setalvad establishes beyond doubt Gandhi's knowledge and concurrence to the Pact.[21]

*Sapru Committee Report*

There was another important report headed by the leading lawyer, Sir Tej Bahadur Sapru, known as the Sapru Committee Report, the committee was composed of eminent men who had no affiliations with the Congress or the Muslim League and were directed to find a solution to this *impasse*. The 30-member committee came to a finding that in the Constitution-making body there should be parity between the Hindus (other than Scheduled Castes) and Muslims in the Central Legislature, contingent on these elections being conducted on joint and not separate electorates.

Much to the annoyance of the Muslim League, the report rejected Pakistan as a solution as it stated that the division of India would "endanger the peace and progress of the entire country." It had the foresight to also suggest a Minorities Commission. Whilst these recommendations did not have any discernible impact on the political class, it is relevant that the notion of parity between the communities was once more asserted by the Commission and this point was repeated by Sapru before the Cabinet Commission in April 1946.

Seervai observed that:

> The Desai-Liaquat Ali Pact and the Report of the Sapru Committee showed that the fear of the Muslims for their future in a united India was genuine, and required to be allayed. And both the Pact and the Report had found 'parity' at the Centre an effective means of allaying those fears.[22]

Seervai also refers by analogy to the Constitution-making in the US subsequent to the War of Independence, where certain compromises were made to ensure unity between the then 13 States, including entrenching certain rights and, critically, creating some Constitutional fictions for the purpose of giving a semblance of equality between the larger and smaller states. For example, every State whether big

or small was given the right to send two representatives to the Senate and that right could not be revoked without the consent of the State. This, in my view, is a fair and apposite analogy.

Even Ivor Jennings, the great apostle of Constitutionalism who had engaged in drafting the Constitution of both Ceylon and Pakistan, was wary when it came to the matter of the suitability of a system of universal suffrage in a post-colonial society. He strongly believed that Constitutions should be adapted to local conditions and was not averse to considering devices such as a limited franchise, indirect elections and community representations. As Madhav Khosla puts it with brisk economy, "Implicit in Jennings's advice was the idea that national sovereignty could be severed from the question of suffrage. A country could be free even if all its citizens did not have the right to vote."[23] This is perhaps a more extreme solution, but whichever way you cut it, there had to be some kind of protection for minority communities from the dangers of rampant majoritarianism.

When we discuss minority rights, we often forget the political and historical climate at the time, and it is fair to say that the matter of protection of minority rights had received much attention post the Treaty of Versailles which effectively led to self-determination amongst the territories formerly ruled by the Austro-Hungarian Empire and the Ottomans. Neera Chandhoke points out that, "after the Paris Peace Treaty, the leadership of the International Committee recognised that… the rights of the Minorities especially protected and guaranteed under a system of international law."[24] So much so that such minority rights were guaranteed in five separate peace treaties between the Allies, Poland, Czechoslovakia, Romania, Greece and Yugoslavia. In fact, the admission of the Eastern European countries into the League of Nations was made conditional on the grant of such minority rights. The League was made the custodian of ensuring the implementation of such rights, the legal body for such recourse being the International Court of Justice. In this context, it is relevant that the two countries that pointedly did not want to give any protection to their minorities were Germany and Italy.

Matters of cultural plurality and minority rights are much embedded in the discourse of human rights. In a United India, such rights would have had universal application to all minority

communities, including Hindus in Muslim-majority provinces. The dismissal of such rights as being too contemporary and woke, is manifestly a transgression of history. The issue always was the idiom to be used in the *melee* of mass politics which is inextricably linked to the nature of the franchise. It is here that the debate between the proponents of political liberty who talk of a mass franchise, collides with those who believe that political liberty in terms of the franchise was always contingent on social equality. As Professor Devji put it, "disagreement between those Indians who thought that political liberty should proceed social equality and others who fear that such a liberty would well perpetuate inequality by empowering majorities and the powerful at the expense of the minorities and powerless."[25] Ultimately, the Constitution ended up entrenching the dominance of both caste and majoritarianism devaluing citizenship and diminishing social equality. In fact, Isaiah Berlin in his seminal work, *Two Concepts of Liberty,* directed this lecture at the post-colonial world, warning national liberation movements that the fight against colonialism could not necessarily be identified as fighting for liberty. It was indubitably a fight for recognition as a people and for the status of nationhood. To believe otherwise would be to guarantee disillusionment.[26]

I believe that had such concessions to minority rights been made, it would have had a domino effect in the Provinces where there were Muslim majorities such as Punjab and Bengal, creating the space for a new language and idiom for such a political discourse, as bestowing such rights on Muslims in Hindu Majority Provinces would have instigated similar demands from the Sikhs and Hindus in Punjab, Bengal and Sindh. By doing so, the matter of minority rights would not be seen as confined to a particular religion: it would have been secularised. This new paradigm would substantially have defanged much of the communal poison that talks of minority rights provoked and continues to provoke. Of course, this is all counterfactual as we do not know what the contents of such rights would be, but it would have undoubtedly acted against majoritarianism and its inevitable consequence in India, 'Sanskritisation', a policy to consolidate the Hindu vote in its existential struggle against Islam.

One of the deficiencies in the Muslim League agenda was defining the contents of the rights it sought to protect, as Maya Tudor put it, "as pan-Islamism receded… the Muslim League would be reincarnated to promote the interests of the entrenched Muslim landed aristocracy in the United Provinces."[27] The complexities of Pan-Muslim politics defied any clear manifesto, so the League was content to peddle religious catechisms with the intent to thwart Hindu hegemony. It must be recalled that the Unionist party in Punjab was a Landlord party, whilst the Krishak Sramik party in Bengal was anti-feudal, both were Muslim-majority provinces and the League had to sedulously manoeuvre such antinomies.

It is safe to conclude that it was largely the unwillingness of the Congress to share power that led to the call for Pakistan and has become the lightning rod for the virulent new nationalism which is now consuming India. It also had a consequential impact on the Muslims of Pakistan, bringing to the fore a new breed of Muslim clerics such as Maulana Maududi, who was determined to create a millenarian Islamic state. With the founding of Pakistan, he had a readymade experimental laboratory to do so. We have seen the grotesque *denouement* of such a misguided policy.

Given the history of Constitutional arrangements in the colonial period, it is evident that there was much concern for minority rights and various devices were created to protect these rights at the cost of adhering to the shibboleth of 'One man, one vote'. I believe it is important for these facts to be recorded because they show, demonstrably so, that the argument for parity between the communities was not some Pollyannaish pipedream that came from nowhere, but was very much part of the political discourse for decades before the Cabinet Mission Plan came to be proposed and enjoyed a degree of consensus amongst an influential group of Indian intellectuals and lawyers.

The issue fundamentally is between people who want to live with one another as equal citizens and those who sought a relationship of dominance over a minority.

# 4

# THE PARTITION

The perplexing issues of nationhood, Federalism, and the treatment of religious and ethnic minorities and their rights, juxtaposed with an audacious vision of modernity and economic progress, were very much at odds. If one argued for colonial secularism, you were accused of being regressive. But all these issues boiled down to the future contours of the nation-state, and it is the gravamen of this book that the possibility of a United India was presented in the form of the Cabinet Mission Plan which was rejected by the Congress. It is often and, in my view, wrongly argued that the creation of Pakistan was the ultimate act of Muslim appeasement; this is far from the case. There is little or no evidence that the majority of Muslims wanted Partition. When references are made to the voting under the Government of India Act, 1935, the electorate comprised only 14% of the total population of British India and to assume that the enfranchised Muslims who voted for Pakistan constituted the majority of Muslim opinion is patently wrong. In any event, that there was an evident reluctance on the part of the States that formed the core of present-day Pakistan to follow the Muslim League, and even Bengal's desire to join Pakistan was problematic.

But what gets lost in this debate is that the demands of minorities for cultural and religious rights were not exceptional and it was for the

majority to cede such demands if the country was to be kept intact. The majority was not prepared to cede such rights to the minority and preferred the solution of Partition. This was made amply clear when Sir Stafford Cripps told Dr. S.P. Mukherji that "… The Hindus were in an overall majority in India and must be prepared to make the maximum concessions. The principle of majority rule, which the Mahasabha invoked in their Memorandum, could not be applied in an unmodified form where there was a perpetual majority and a perpetual minority."[1] It must be remembered that Cripps was a well-wisher, a socialist and someone who had a strong belief in Indian independence, as well as being a lawyer of some eminence. At any rate, the Partition was not possible without the tacit support of many of the Hindu Right. In this context, the Left and the centralisers such as Ambedkar also played a significant role, as both Nehru and Ambedkar were anxious to create a unitarian structure, although one which was nominally styled as federal, to push through an ambitious social and economic agenda.

I think it apposite to view the Partition through the lens of 'the hospitality of narratives',[2] as it invites one to consider that many different, informed perspectives on the same events can and do exist—this liberates us from finding or subscribing to a single unifying narrative of the past. An analysis of the Partition would be a book in itself but it is essential to analyse this singular event since Independence, without which one cannot understand our present predicament. It was uniquely transformative in both its scale and the searing impact it had and continues to have on our collective memory. It was and is our very own Holocaust.

Yasmin Khan does not assume that the Partition was inevitable, and dwells on what she states: "Partition set in motion a train of events unforeseen by every single person who advocated and argued for the division."[3] She attributes much blame to the British for the shoddy way in which the Partition Plan was implemented, but ultimately it is instructive to analyse what the principal actors at that time thought of the future and what were their expectations and hopes.

What animated the key players at that time and their vision of the future Indian State is relevant and I will deal with each of the main

actors in this fascinating *dramatis personae* further on, but some events around the time must first be highlighted to provide context.

### *The Cabinet Mission Plan and the Partition*

An interrogation of the historiography of the Partition shows the controversies over Federalism as pivotal in deciding whether British India was to remain a unified structure. The opportunity for the discussion on this was the Cabinet Mission Plan in 1946, which set out a political structure allowing a degree of Federalism to forestall the matter of Pakistan as a sovereign State. Broadly speaking, the Plan involved the devolution of power to Muslims within the body of a United India.

The proposed Federation was to be organised in three layers, with a Central Government controlling the portfolios of defence and foreign affairs. The next layer envisaged provinces with autonomy in certain matters but with the option of grouping together to address other questions of their choice. This gave the Muslim blocs a certain veto right, contingent on whether the issue warranted its exercise. In this regard, it provided a degree of parity between Hindus and Muslims which is what the League desperately wanted. I believe it was ingeniously drafted.

An important aspect of the Plan was that it preserved the right for a province to secede if dissatisfied with the status quo for a period of ten years. Zareer Masani describes the intent well in "that this cooling-off period might enable politics to coalesce around non-sectarian lines, with time healing both sectarian divisions."[4] To my mind, at the time of the Cabinet Mission Plan, whilst some divisions existed, there had been no obvious communal incident that would have animated this primeval barbarism. But certainly, it gave impetus to a federal structure to develop and safeguard the interests of the minorities and, crucially, retain the glittering prize of a United India.

The Muslim League had in principle agreed to the Plan, but it was rejected by Congress. While it may not be entirely accurate to state that Congress rejected the Cabinet Mission Plan entirely, it did not accept the groupings of States that were critical to the Muslim Leagues' acceptance of the Plan, principally the position

of the North West frontier province, a Muslim-majority province that voted for the Congress. The crux of the issue was the matter of parity. Jinnah sought the views of Sardar Patel on the vexed issue of majoritarianism and Patel plainly stated that he would never consider parity in the Central Government.[5] All of this led H.M. Seervai[6] to conclude that in his view "the relevant documents in the Transfer of Power… support a paradoxical statement that it was Congress that insisted on Partition. It was Jinnah who was against Partition."

Ultimately, it was Nehru who torpedoed the whole Plan with a remark at a press conference in Bombay in July 1946 after the All India Congress Committee meeting that the groups were only transitional arrangements pending the drafting of a popular Constitution.[7] This caused the League to withdraw their consent to the Plan and unfortunately led to bloodletting, consequent to Jinnah's call for direct action. There is much ambiguity about what 'direct action' exactly meant. What Jinnah seemed to mean was what Congress had been pursuing all along; not being constrained by Constitutional methods and taking to the streets to express their feelings. Unfortunately, this was followed up by a call by Jinnah to observe 16 August 1946, as Direct Action Day, and in Bengal, the League Premier, H.S. Suhrawardy, declared a public holiday causing communal violence to erupt. Calcutta was the epicentre of this violence, leading to over 6,000 deaths and most of the victims were, ironically, Muslims. Jinnah had never anticipated such an occurrence, but with such violence unleashed it was difficult to contain.

Nehru's recalcitrance may be traced to core differences in the political and economic ideologies of the Congress and the League. While some indulge in the quixotically fanciful binary between Nehru, 'being a committed socialist' and wanting a strong Centre and Jinnah with his commitment to 'free markets', the position was more nuanced. Nehru was undoubtedly Left-leaning but the Congress was not committed to a socialist ideology. The Mahatma, Sardar Patel and others could not, by any description, be described as socialists. In fact, Congress was very dependent on finance from businessmen such as the Birlas and the Bajajs. G.D. Birla's shadowy role and influence on Gandhi is rarely talked about, but some of his interventions were extraordinary, such as writing to Gandhi to

torpedo the prospect of a Hindu-Muslim coalition in Calcutta in 1942 on the basis that it would prejudice Marwari business interests.[8] On the other hand, there is a perception of Jinnah's commitment to free markets. He was ever the political opportunist. This was demonstrated in the 1947 budget which was presented by Jinnah's protégé Liaquat Ali Khan, which was so radical that it shocked the Congress. In fact, the Congress opposed the imposition of a wealth tax on the ground that it discriminated against the Hindu merchant class.

This budget in February 1947 more or less sealed the issue of Partition for Sardar Patel and Menon. It was extraordinarily redistributive, abolishing the Salt Act, removing the bottom layer of society from income tax, imposing 25% Corporation Tax on companies with a profit of more than Rs.1,00,000 and imposing a capital gains tax. Much of the detailed work had been undertaken with the assistance of H.M. Patel, then an Indian Civil Service (ICS) officer, who later became Finance Minister in the Janata Government. Sardar Patel was shocked and Nehru embarrassed given his much-vaunted socialist predilections and, perhaps, that was the intention.

So, the real reason that prompted the Congress to reject the Cabinet Mission Plan was indubitably the desire for power at the earliest, one untrammelled by the necessities of having to deal with the pesky complexities of the Muslims, the Dalits and the Princely States. Therefore, the visions and meanings of Statehood and the Partition for different principal actors of that time are an essential study to gain meaningful insight into the Partition and the events leading up to it.

*Nehru*

Jawaharlal Nehru was dismissive of any clear-cut definition of what a Nation consists of. He refused to believe that it could be sought from historical or cultural factors or even racial or linguistic ones.[9] What he viewed as essential was a consciousness of unity and so, if a number of communities aspired to work together and form a political construct, they could be regarded as a nation. However, the nationalists' position was that those who lived in the territorial entity known as India and acknowledged they were Indians belonging to

the one Indian nation. As Maulana Azad put it, "Religion is for God and the Homeland is for everyone."[10]

Nehru had little time for the Hindu-Muslim problem, and according to Madhav Khosla, he saw "the challenges that modernity posed were economic and political rather than religious…"[11] With this view, it was difficult for him to even comprehend the fears of the minorities; he just assumed that such protections that will be provided within the Constitutional framework would be sufficient. He characterised Jinnah's politics of mingling religion with politics as belonging to the Dark Ages. This proved to be a major disadvantage during negotiations with the League.

I believe that Nehru's outlook on nationalism was colonised by a nineteenth-century liberal modernist understanding of history which assumed a linear and progressive view of human development; what Herbert Butterfield has cuttingly called the 'Whig view of history'.[12] The political scientist Sudipta Kaviraj analyses this with acuity when he observes that, "this [view] often implied an irreversible historical motion from traditional identities like religion to modern ones like the nation, and simply assumed that once a modern 'nationalist' identity was formed, social groups could not 'regress' into traditional identity again."[13] This belief in the inevitable shedding of identities meant that he did not believe that minorities deserved any special entitlements. Sunil Purushotham argues that:

> Nehru was a majoritarian in the sense that he did not believe in the necessity or the absolute rights of the minority to participate in state power. Rather, he thought that the majority should wield power in a responsible manner that acknowledged the vulnerability of the minority, essentially adapting Gandhian notions of trusteeship to a statist order.[14]

H.V. Hodson[15]characterised the act of the Congress of sabotaging the Cabinet Mission Plan as a blunder of the first order. The matter of whether the estrangement with the League at this critical time was indeed a blunder of the first order assumes that the Congress saw the preservation of a United India as its primary objective over independence at any cost. On the contrary, I believe that the Congress was more interested in acquiring power at any cost, even if

it meant a Partitioned country. One could argue that Independence *per se* was not an issue any more as the British under the Attlee Government had agreed to give India independence, and post-1945, the Congress was effectively pushing at an open door. As Attlee put it in Parliament, "The British Commonwealth Empire are not bound together by chains of external compulsions… and so if India elects for Independence she has every right to do so."[16]

The critical issue that remained was what kind of India was to be envisaged. It is at this juncture that the issue becomes complicated, not just because of the League's forceful advocacy for Pakistan, but powerful constituencies and interest groups within the Congress which went along with the Partition narrative for their own reasons. Neeti Nair cites a leading Punjabi Hindu leader, Dr. Gokul Chand Narang, some 20 years after Partition, who commented that Jinnah was, in a way, wrong in asking for parity. "You know he wanted parity. If parity was there, Hindus would have been absolutely nowhere. I was chairman of a public meeting. I said that I would agree to Pakistan, but never to parity. Pakistan was a much lesser evil than parity." Nair concluded that some Punjabi Hindus preferred Partition to a United India.[17]

This aspect of the Partition debate is rarely commented on as it is much more convenient, I believe, to heap the blame on Jinnah and the Muslim League. As Aakar Patel puts it,

> It is incorrect and cruel therefore to say that Muslims Partitioned India when their every attempt under Jinnah was to try and preserve the Union. It is equally wrong to assume that a weak Congress capitulated. It is the strength and backing received from over 90 per cent of the Hindus, that gave Congress the arrogance to go it alone and dismiss the legitimate demands of India's Muslims.[18]

### *Dr. Ambedkar*

While Dr. Ambedkar's views on centralisation are well known, his views on the Partition and the Muslims are less so. *Thoughts on Pakistan* is often referred to as a powerful argument by Ambedkar for Pakistan.

It is essentially a performative exercise in dissembling disinterest, as it gives the impression that he thought that Pakistan would be a satisfactory solution for the Hindu-Muslim issue. However, whilst he feigns at being fair and making an even-handed assessment of the demand for Pakistan, the actual thrust of his argument is that an undivided India was a far worse alternative than Pakistan. In support of this proposition, he referred to the Muslim League's litany of demands which he claimed would weaken the Indian state, reducing it, in his words to the 'sick man of Asia'. He was also dismissive of the sentimentality of the composite culture which those Congressmen anxious to preserve a United India referred to, describing it as "a result of a dead past that had no present and no future."

Ambedkar also expressed concerns about the large Muslim presence in the army as he identified a political army posing the greatest danger to India's liberty. The Muslim presence in the Indian army was around 40%, disproportionate to its population, a fact that troubled Ambedkar as he believed that if there was a clash between the communities, the feelings of disaffection could percolate down to the armed forces and could lead to civil war.[19]

This fear of violence was pervasive and Shruti Kapila has captured his thinking very well by placing his vision in the praxis of an "institutional design in which the subject—national and Dalit—was embedded in popular sovereignty. Agonism, or the recognition of hostile distinctions as opposed to their violent eradication or wilful neglect, in effect, became the nonviolent condition for the life of the Indian nation and democracy."[20]

He was aware that the creation of Pakistan made Partition and population transfers necessary but did not feel that these would be very substantial. I also think Ambedkar was conscious and insecure about the proselytising tendency of Islam as many Dalit and Adivasis would be targeted, reducing his constituency and potential power base.

Both Nehru and Ambedkar were anxious to have in place a strong Central Government in a substantially unitary state, though federal in name. I believe that they thought this was to promote central planning, as is often stated, but, critically, for legislating wide-ranging social reforms, particularly in relation to Hindu society and

to address centuries of oppression and discrimination meted out to the Dalits and lower castes. As Khosla put it, "As far as they were concerned, India needed democracy and it needed modernity—and democracy and modernity needed one another."[21]

### *Sardar Vallabhbhai Patel*

Sardar Patel is a prodigiously significant figure in the run-up to the Partition and thereafter. If Nehru represented the Left or liberal wing of the Congress Party, Patel represented that traditional Gandhian element, a politician who shared the Mahatma's emblematic frugality and abstinence without any of his redeeming qualities such as empathy for the weak and the minorities. What he did have was a sharp and deep understanding of the Hindu psyche, as he was not only a devout and religious Hindu but one who harboured a deep-seated animosity towards Muslims and the syncretic culture,[22] which he regarded as an abomination.

Patel, contrary to current mythology, was content to let Nehru project himself as the progressive face of the Congress, whilst he was the backroom boy, exercising the real levers of power in conjunction with the more traditional elements of the party, the local Congress provincial leaders and the Princely States. This even extended to elements outside the party, reaching shadowy organisations such as the Mahasabha and the Rashtriya Swayamsevak Sangh (RSS), for example. His close relationship with N.B. Khare, the Prime Minister of Alwar was emblematic of this. It would be fair to say that even if he did not openly subscribe to the two-nation theory, his politics were explicitly majoritarian and wherever possible, he would seek division and was not averse to instigating violence where he deemed it necessary. According to Shruti Kapila,

> Throughout 1947 and 1948, Patel steadfastly maintained that the potential means and ends of violence rested with the people… Both at the height of violence and in peaceful pauses, he continued to pursue the logic of division or Partition as the necessary condition for the attainment of national sovereign power.[23]

If there is a scintilla of doubt regarding Sardar Patel's views on Muslims and the future of Pakistan, Leonard Mosely, the British journalist who covered the independence period, disabuses one of any illusions.[24] He discloses that when Jinnah left Delhi in 1947, after delivering a conciliatory message in which he appealed to both Hindus and Muslims to bury their past and wished India success and prosperity, Patel, in response, said the following day that:

> The poison has been removed from the body of India. We are now one and indivisible. You cannot divide the sea or the waters of the river. As for the Muslims, they have their centres here. I do not know what they can possibly do in Pakistan. It will not be long before they return to us.

His contempt for Muslims was well known, as it was for their culture. He famously remarked that "the Muslims do not like to work hard. They want to wear fine clothes and sing ghazals. Who will do the hard work in Pakistan?"[25]

In line with the current political temperament where ideological difference ineluctably leads to hatred and alienation, the propaganda is that Patel's and Nehru's differences spilled over into personality clashes. The new revisionism about Patel paints an unbridgeable divide between him and Nehru, in the belief that Patel lusted for the position that Gandhi ultimately bestowed on Nehru.

In a recent book by Narayani Basu on Patel's great protégé, V.P. Menon,[26] it is alleged that Nehru was so upset and alienated from Patel that he did not want him to be in his first Cabinet.[27] However, Srinath Raghavan has shown this to be patently untrue on the basis of contemporaneous correspondence, including a letter from Nehru to Patel on 1 August 1947 inviting him to join the Cabinet and describing him as "the strongest pillar of the cabinet".[28]

It is also important to understand that while the population exchange was the lightning rod for the violence of the Partition, it was not obvious to many at the time that Partition would necessarily involve such exchanges. Gyanendra Pandey observes that "until almost the end of August 1947, Jinnah and Jawaharlal Nehru, along with a host of other leaders and officials, expressed their opposition

to any large-scale transfer of populations. Yet by the beginning of September, several lakhs of Punjabi refugees were on the move, under official coordination."[29] Even as late as May 1948, Hussain Suhrawardy was still urging the need for minorities to return to Sindh and East Bengal. Patel, however, played a double game.

On the one hand, he encouraged Hindus in Muslim-majority provinces (which would become Pakistan) to migrate to India and even went as far as to suggest to Nehru that if the migration of Hindus from Pakistan persisted, India would be constrained to expel Muslims in equal numbers from West Bengal. Nehru ignored this advice but it shows, demonstrably so, that as far as Patel was concerned, his goal was that of a majoritarian state and the fewer Muslims he had to deal with, the better. Together with Shyam Prasad Mukherjee, he was also a passionate advocate of the division of Bengal along communal lines, claiming that this was the true desire of Bengali Hindus, a proposition strongly contested by Sarat Bose who had the foresight to see the extraordinary disaster the Partition of Bengal would cause, both economically and politically.[30] In fact according to M.K. Kriplani, the exodus of Hindu Bengalis was accelerated by the deteriorating economic conditions in East Pakistan due to "India's strangulation".[31]

It must be understood that in April 1947, the Premier of Bengal, Huseyn Shaheed Suhrawardy had been requesting that the British and Jinnah consider the possibility of an independent Bengal. What Suhrawardy proposed was an independent, undivided and sovereign Bengal in a divided India as a separate dominion. Jinnah did not have an issue with this and told Lord Louis Mountbatten, Viceroy of India, that he "should be delighted, what is the use of Bengal without Calcutta; they had much better remained united and independent; I am sure they would be on much friendly terms with us."[32] Almost as a presentiment of the future, the President of the Bengal Muslim League, Abul Mansur, stated in 1944 that:

> Religion and culture are not the same thing. Religion transgresses the geographical boundary but *tamaddun* (culture) cannot go beyond the geographical boundary [...]. For this reason, the people of Purba [Eastern] Pakistan are a different nation from

the people of the other provinces of India and from the 'religious brothers' of Pakistan.[33]

This is crucial to understand that there was an all-embracing recognition of the power of a common culture and linguistic identity as being critical to the Constitution of a nation-state, with religion coming a poor second.

It was Sardar Patel who insisted on the division of Bengal on communal lines[34] and, to that extent, accentuated the damage wrought by Partition, as this division was entirely egregious and could have been avoided. People were unnecessarily displaced, with many flooding into Calcutta and Assam, creating issues that still persist to this day. Now we have the reality of Bangladesh, an independent sovereign state, but one born out of a horrendous bloodbath which could also have been avoided as well as the serious economic disruption caused by the Partition, particularly to Calcutta. The Partition cut it from its hinterland and condemned it to rapid decline as the great entrepot and cultural cynosure of Bengal, and what, as Geoffrey Moorhouse described, "the second city of the Empire".[35] The reality was that a United Bengal would have had similarly sized Hindu-Muslim populations, with the Muslims having a slight majority. I believe that the possibility of continuous strife and possible bloodshed was remote and, with the benefit of hindsight, perhaps an independent Bengal would have created the basis for a new Indian federation, independent of the 1935 Government of India straitjacket. A large culturally and linguistically homogenous State comprising of both Hindus and Muslims would have been a new paradigm and would have compelled the consideration of a more decentralised federation.

If there was a desire to see India as a composite State, which is identified with Nehru, the distinction Purushotham draws between Patel and Nehru is that Patel "thought that it was primarily the responsibility of minorities to behave appropriately. For Nehru, however, the legitimacy of Indian democracy would be measured in terms of the effectiveness of state protection of Muslim life and property."[36] These contrasting views were evident in a phenomenon not much remarked upon, the return of disillusioned Muslim

migrants from Pakistan to India between 1947 and 1948. At this stage, the Indian Government had promulgated the Emergency Permit System in July 1948 to distinguish and almost certainly discriminate between the two migrations into India; a permit system for Permanent Resettlement for Hindus and Sikhs and a permit for Permanent Return for Muhajirs (Muslims returning from Pakistan). There were different procedures which distinguished these two channels of migration, one designed to welcome the Hindu and Sikh migrants, the other to discourage the Muslims who sought to return to their former homes. This was very much the brainchild of Sardar Patel as Home Minister and is consistent with his mindset.

It is also alleged that even those Muslims who left for Pakistan in 1947 were somehow disloyal to the idea of secularism and repudiated India. Patel stated that "those who are disloyal will have to go Pakistan." [37] This is patently unfair, as in many cases the reasons for the migration had little to do with ideology, but more out of fear of how they would be treated as minorities. Yet Sardar Patel, who was anxious to encourage the migration of Hindus and Sikhs from Pakistan did not see that those who chose to migrate to Pakistan did so for much the same reason Hindus and Sikhs were fleeing Pakistan. Some of the grisliest massacres of Muslims occurred in the Princely States of Jammu & Kashmir, particularly Jammu (over 200,000 dead) and on the Meo Muslims in Alwar and Bharatpur (82,400 killed and 44,000 converted), in advance of the Partition to create a sense of panic amongst Muslims. They were used by N.B. Khare (the Prime Minister of Alwar) and Patel to expel the Meos from Alwar to Pakistan, even before the terrible massacre of Sikhs in Rawalpindi which triggered the Punjab bloodshed. The Jammu massacre, amounting to ethnic cleansing, is a matter that does not feature much in the public discourse and it is to the credit of Swaminathan Anklesaria Aiyar that he even brings up this long-forgotten massacre and draws an eerie parallel with the expulsion of the Kashmiri Pandits post the eruption of terrorism in 1989. [38] Even the Mahatma commented on the 1947 massacres saying, "The Hindus and Sikhs of Jammu and those wo had gone there from outside killed Muslims. The Maharaja of Kashmir is responsible for what is happening there… Muslim women have been dishonoured."[39]

One of the myriad tragedies of Partition was the fate of the Hyderabad State, the grandest and most opulent of all the Princely States. The egregious massacres of Hyderabadi Muslims were almost entirely initiated by Sardar Patel, deceptively described as 'police action'.[40] The term 'police action' seeks to burnish a brutal and savage pogrom against the Muslims, which in today's argot would be described as ethnic cleansing. It is estimated that anywhere between 30,000 to 40,000 Hyderabadi Muslims were killed in this shameful episode. It was also an attempt at vandalising a rich and vibrant syncretic culture and civilisation fabricated over centuries, culminating in a delicate and sophisticated sensibility. One finds the vestigial remnants of this prodigiously evolved culture in Hyderabad even today, in the cuisine, the language, *dakhani* and the architecture.

Much has been commented on the implacable obduracy and intransigence of the Nizam to any sensible solution. He had a delusional sense that if the state had access to a coastline such as the Goa corridor, he could seek independence and autonomy. The harsh realities of geography made Hyderabad a state surrounded by India and militarily indefensible. This fact, coupled with the demographics of 90% of the population being Hindus, made the secession of the Hyderabad state to India more or less inevitable. It was only a question of what privileges the Nizam could salvage from this and safeguards for the preservation of the old Hyderabadi culture which politicians like Patel viewed as "*an ulcer in the heart of India*."[41]

Yet this grotesque obstinacy on the part of the Nizam to agree to a settlement which was offered at the time, cannot justify the degree of savagery unleashed on Hyderabad and its Muslim population by Sardar Patel and the Indian army as a form of collective punishment for the earlier depredations by the Razakars in rural areas. His culpability in initiating such massacres is indubitable. The Sundarlal Committee set up by Nehru, issued a report which directly implicates the Indian State in a massacre of people who had surrendered, and as such no government has an interest in releasing such a record of infamy. The Government of India still refuses to officially release the Report, although somehow the Report is available on the net.

If there was any doubt about the scale and viciousness of the violence inflicted on the minority community during the police

action, I will quote from the Sundarlal Committee. The Committee reported that:

> We can say at a very conservative estimate that in the whole state at least 27,000 to 40,000 people lost their lives during and after the police action… in the town of Latur the home of Kasim Rizvi—which had been a big business centre with rich Kucchi Muslim merchants, the killings continued for over 20 days. Out of a population of about 10,000 Muslims they were found to be barely 3,000 still in the town. Over a 1000 had been killed and the rest have run away with little else besides their lives and were completely ruined financially.

They went on to report that "rape, abduction of women,… loot, arson, desecration of mosques, forcible conversions, seizure of houses and land, accompanied the killings… the sufferers were Muslims who formed a hopeless minority in the rural areas."[42] Sunil Purushotham remarks that much of the silence on the part of the Muslims in relation to this violence and depredations was contrasted to the violence in Punjab "which was not necessarily about pushing them out but rather about pushing them down. Violence forged, at once, a relationship of association and submission."

It is relevant that at the Cabinet meeting after the police action Nehru was so disturbed that he walked out, and so, to his credit, did Rajagopalachari, but this did not prevent Sardar Patel from continuing with the Cabinet meeting as if nothing had happened.

It is evident from his speeches that he remained "convinced that our having agreed to Partition has been for the good of the country."[43] He even said that "Now that Pakistan has been established, there can be no quarrel between Hindus and Muslims."[44] Thus, for Sardar Patel to even imagine that with the creation of Pakistan, the Hindu-Muslim question had now ceased to have any traction was absurdly myopic, to say the least. His strategy in encouraging the Hindus and Sikhs to migrate to India from Pakistan only assisted the cause of the 'confused fantasists' and Sharia ideologues in their project to create an Islamic state, leading inexorably to conflict with India and its eventual alignment with an unfriendly power such as China. Given its size and capabilities, Pakistan was always going to be

a client state. The only question that remained was that of who? The Congress foolishly succeeded in externalising what was an internal conflict into an international one, and Patel is the prime culprit in all the steps taken in this regard. One explanation for this was that Patel assumed that the whole edifice of Pakistan would collapse overnight,[45] and that Partition was going to be a brief albeit horrible interlude between division and a subsequent forced reunification of India, in which the Hindu Right would be at liberty to impose their terms on the inevitable return of the Muslims.

However, to Patel's credit, his most lasting achievement was the incorporation of the Princely States into the construct of modern India together with V.P. Menon. The singularity of his achievement can be demonstrated by the comparative failure of the Muslim League which had fourteen states, either within Pakistan or contiguous to it and on the 14th of August only one, Swat, had acceded to Pakistan. In contrast, on the 15th of August, India's Independence Day, all but 6 of the 548 Princely States had been incorporated into the Indian union.

### *Gandhi*

Gandhi was more realistic than Nehru in that he understood the menace communalism posed and, in his lifetime, sought to establish a sense of trust between the two communities who he viewed as two brothers. In such roles, he believed, there was a duty for the brothers to practise unity, to help each other and to relinquish matters of value if they offended the other. One such issue that Gandhi sought the Muslims to give up voluntarily was cow slaughter but he also sincerely believed that it was the duty of Hindus to protect the Muslims, being a minority.[46] He never saw the issue in terms of rights-based solutions, but one based on the principle of universalism and trust. As Martha Nussbaum put it, "Gandhi reinterpreted the Hindu tradition in a more egalitarian manner than was conventional."[47]

This position was consistent with his conception of the State in contrast to Nehru's and in many ways, his horror of what a centralised State may lead to is very prescient. In his principal work, *Hind Swaraj,* he envisaged an India of villages where the village was pivotal in defining society, power relationships and economics. In

his thinking, he belonged to the pluralist tradition where the locus of power is dispersed and fragmented amongst various groups and associations. So, he saw the dangers of nationalism particularly from a centralised political structure and for that reason, was deprecating of the Western model. He argued that it would lead inevitably to coercion and that, in effect, India would be substituting one oppression for another.

The Mahatma's view on future Constitutional arrangements was at best inchoate. It was clear that he didn't warm to the idea of Western civilisation which he termed 'The Kingdom of Satan' dominated by the 'God of War'.[48] In sharp contrast, he described Indian civilisation as dominated by the 'God of Love'. He saw freedom as an opportunity for India to "revert to their own glorious civilisation."[49] He was characteristically opaque as to what parts of this civilisational patrimony were required to be retained and what was to be excised; in that he was as ever the master of exquisite equivocation.

Ashish Nandy tries to explicate this argument in the context of religion and secularism by arguing that the Gandhian position was that the intoxicating power of religious belief should be harnessed to practise tolerance and these principles of tolerance and co-existence were best defined by society rather than by State mandate.[50] This thinking is consistent with Gandhi's belief in a duty-based system rather than a right-based one; the people had an *a priori* duty, for example, to protect minorities and to not disrespect Dalits and Adivasis. The difficulty with this argument was that the momentum and impetus of modern democratic politics lays stress on identities, religion and caste, as mobilising forces which has now led to the political *cul-de-sac* of an illiberal democracy that energises community sentiment for political favour, jobs and benefits, and these trump all the civilities the Mahatma considered central to his project. This also has to be coupled with the momentum of territorial nationalism which views the retention of every inch of territory as being part of the Government's principal duty to maintain sovereignty at any cost.

The Mahatma's first important intervention in Hindu-Muslim politics was supporting the Khilafat Movement, to consolidate the Muslims of India against British rule by reason of the war against

Ottoman Turkey by the British Empire. It was argued that the Muslims of India owed a sense of loyalty to the Ottoman Caliph who, at that time, was the Guardian of the Holy sites of Mecca and Medina. This movement was avowedly religious in character, and gave Gandhi the opportunity to sideline the more secular and westernised Mohammed Ali Jinnah amongst the Muslim masses with the evocative cry of 'Islam in danger'. Many saw this as opportunistic and remarkable in that one of the last mainstream politicians to take up the cause of the Caliphate before ISIS was Gandhi, the father of non-violence.

The jury is still out as to the far-reaching consequences of the Khilafat Movement, as it was clearly a controversial move. As a political tactic, it was truly inspired and had the undoubted effect of galvanising the common Muslims behind the nationalist movement in a way that no elite Muslim leader could manage. But the strategy was fraught with risk, as it brought to the surface the most atavistic and regressive forces and, unfortunately, fed into the majoritarian narrative of the Muslims being a people who looked to Mecca and the Middle East as the source of their redemption, not to India.

During the period leading up to Partition, the role of the Mahatma was more symbolic than political, much of his thinking in *'Hind Swaraj'* for example was ignored by both Nehru and Ambedkar, as were his views on cultural plurality by many on the Hindu Right including his protégé, Sardar Patel. His decision not to support the British in their war effort proved costly for the Congress in that it allowed the League to assume control of Provincial Governments with the support of the Hindu Mahasabha. His attempts at preventing the Partition of India, including the Gandhi-Cripps Pact was a doomed attempt as was his effort to secure the Congress to accept the Cabinet Mission Plan.

Many would argue that the manner of his death, the brutal assassination by Nathuram Godse, a self-proclaimed Hindu Nationalist, set back the cause of Hindu nationalism and paved the path for a nominally inclusive and secular India, at least in the 1950s and 1960s, the high noon of the Nehruvian consensus. If nothing else the manner of his death brought together otherwise dissonant voices in the Congress on the same platform, albeit for a brief period. As

Pratap Bhanu Mehta put it, "The new State would not have been able to delegitimise Hindu Nationalism to the extent it did."[51] Perhaps that remains his most enduring and signal contribution to the cause of the people he so loved.

## *Jinnah*

At the time, Jinnah was working closely with Hindu secular leaders like Gokhale to keep religion out of politics and had successfully engineered the Lucknow Pact of 1916 which provided a basis for future Hindu-Muslim cooperation. He saw the Khilafat Movement, with all the religious symbolism and the emotional fervour it inspired as undoing his work as a secular liberal Muslim working in the nationalist interest and never forgave Gandhi for his support. When Jinnah resigned at the Congress Nagpur Session in 1920 he stated: "I will have nothing to do with this pseudo-religious approach to politics. I do not believe in working up mob hysteria, politics is a gentleman's game."

The most compelling description portrayed of the metamorphosis of Jinnah from the apostle of secularism to the champion of the Muslim interest is found in H.V. Hodson's book *The Great Divide*. It is worth quoting at length. "Jinnah's estrangement from the Congress and his emergence as a purely communal champion were evidently due both to personal causes and to political conviction. His Muslim nationalism had become paramount above his Indian nationalism. His pride had been wounded by the disdain with which the Congress and Liberal leaders of the late 1920s had treated him. Jinnah never submitted to a slight: anecdote after anecdote tells of his cutting rejoinders to anyone who snubbed him intentionally or unintentionally, whoever he or she might be—a Judge, a Governor-General, a Secretary of State, a noble lady. Neglect was a slight rebuff of an insult. The grievance of his rejection by the Congress leaders would not be assuaged until he had finally frustrated their purpose, twenty years later. Mahomed Ali Jinnah was always a man of principle, but he was supremely a man of pride."[52] I think this sums up the man exquisitely, particularly his exaggerated sense of *amour propre*.

Jinnah was compelled to argue for an Islamic state, which he thought was necessary to mobilise the Muslim community and to secure the rights of the Muslims, particularly the Muslim minorities in UP and Bihar in the quest for parity. As Farzana Shaikh shrewdly observed,

> Jinnah himself contributed to this process by appealing to the language and rhetoric of Islamic universalism as a means of defeating the tribal, racial and linguistic affiliations that threatened to ruin his Muslim nationalist project. Unfortunately for Jinnah, much of the discourse of Islamic universalism upon which he had been forced to rely to realise his political project had been shaped by the ulama and their version of a Sharia-based Islam.[53]

Khaled Ahmed remarks that Jinnah had no idea that the Sharia would involve the introduction of barbaric criminal punishments such as stoning and cutting off hands, and that is what many of the conservative ulama were salivating at the prospect. In fact, Allama Iqbal in his book *The Reconstruction of Religious Thought in Islam* in the 1920s dismissed the idea that the rules relating to the penalties of crime should be introduced, arguing that they were only specific to that time.[54] In fact, Allama Iqbal's son, Javed, wrote that "The Jinnah-Iqbal correspondence, discussing Shariah, points to the establishment of a state based on Islam's welfare legislation; it does not propose that in the new state any laws pertaining to cutting of the hands (for theft) and stoning to death (for fornication) would be enforced."[55] This was highly controversial at that time as Iqbal was declared a *kafir* (a non-believer) for saying this.[56]

However, Jinnah did what he was told to do by the Ulema and his campaign and speeches are replete with fundamentalist tropes, as documented by Venkat Dhupalia.[57] Dhupalia's book was well received, particularly in the post-9/11 United States, as it dealt with revanchist Islamic thinking, the desire for a Caliphate as a political construct, and feeds into the 'Clash of Civilisations' narrative perfectly. To transpose these farragoes of fundamentalist fictions as the reason for the creation of a despised and discredited ally was most convenient for the United States, particularly when presented

in the guise of history and one which the Pakistani establishment could not sensibly counter. It also chimes well with the revival of the two-nation theory now espoused by the Hindu Right.

In his study, Dhupalia downplays the role of the Hindu Right as the key facilitator of Partition, the fact was that Vinayak Savarkar had accepted the two-nation theory before Jinnah. If one leaves Savarkar's views aside, the reality was that there were three provinces where the Hindu Mahasabha aligned with the Muslim League in 1941 to form Governments and remained emphatically agnostic as to Partition.

Clearly, there were numerous writers and propagandists who urged an Islamic state, but it is not certain to me that Jinnah subscribed to these thoughts. Even as the gravitational force for the creation of Pakistan, it is plainly deficient in that this argument ignores the economic dimension, which was the trepidation of getting employment for young Muslims, who were less able to secure education than their Hindu counterparts, which explains the large migration of young and educated Muslims to Pakistan. Neither does it really deal with the growth of Hindu extremism as an existential factor in fuelling the Muslim fear of a Hindu Raj. Dhupalia concentrates almost entirely on religious dogma and millenarianism as being the driving force for Pakistan, a clever conceit to distract from the reality of an intransigent Hindu Right. As Mani Shankar Aiyar puts it, the idea of Pakistan originated "with such a tiny handful of confused fantasists that to even suggest that the demand began with the Muslims of India would be a transgression of history and a violation of fact."[58] Yet these confused fantasists and assorted obscure clerics and ideologues are valorised and given undue prominence in relation to the creation of Pakistan as it conveniently diverts attention from the real culprits, the Hindu Right, the centralisers as well as the Left.

Jinnah's implicit vision was a federal India with a degree of parity between Hindus and Muslims at the Union level, a position where he believed he could protect the rights of the Muslim minorities in Hindu-majority provinces. As the historian Ayesha Jalal perceptively pointed out,[59] the Achilles heel in his strategy was his failure to persuade the minorities in the Muslim-majority provinces, particularly Punjab and Bengal which were ultimately Partitioned,

that they would be protected and have full citizenship rights in the new state as minorities.

Jinnah manifestly had no vision for Pakistan for the simple reason that according to Barney White-Spunner, "Jinnah was not then intending it to be a separate state outside a federal structure. The appeal to the British to stay longer, the insistence on the division of the army, which he and Liaquat both thought would be unacceptable, even if it was accepted would take several years, reemphasise that Jinnah was, as Wavell had pointed out, using the idea of Partition as a threat to get what he wanted. But Jinnah did not actually say what he wanted."[60] His chemistry with Mountbatten was a disaster as Mountbatten took him at his word and condemned him as a psychopathic case.

Ultimately, Jinnah ended up with what he described as a "maimed, moth eaten, mutilated Pakistan",[61] with two wings, the North West Frontier, Baluchistan, Sindh and Punjab in the West and East Bengal, by far the numerically largest province, in the East with over 1000 miles of India in between and hardly any tangible protection for the Muslim minorities which remained in India. In this regard, Jinnah's project was an abject failure. Khosla captures his achievements and failures in the most incisive way, stating, "Mohammad Ali Jinnah's achievement lay in posing the problem of representation at a time when few others were willing to address this issue. His failure lay in an intransigent commitment to an earlier form of politics. He tried to place an old model of representation onto a new system, which unsurprisingly territorialised the question at hand."[62] I think that Khosla gives greater agency to Jinnah than he actually had. The reality was that the Muslims of undivided India were only spatially concentrated in the areas which became Pakistan, leaving the more intractable issue of the fate of the Muslims who remained behind unaddressed. These were issues which could only have been dealt with within the context of a federation as was envisaged in the Cabinet Mission Plan, and some form of parity, but that was contingent on the Congress' acceptance.

Jinnah failed in his endeavour to preserve the unity of Punjab and Bengal, even to the extent of agreeing to an independent Bengal. Jinnah's dalliance with some of the Rajput royals such as the Maharaja

of Jodhpur who almost joined Pakistan, indubitably demonstrates his desire to have a substantial Hindu population within Pakistan, as that, in his view would have entrenched a powerful constituency for secularism along the lines of his 11 August 1947 speech in Karachi.

In this context, I think that the two Kathiawadis were on the same wavelength. As Professor Devji has observed "Jinnah, of course had also resisted the Partition of these provinces and was perhaps unfairly interpreted as doing so in order to gain more territory for Pakistan, while retaining the large Hindu and Sikh minorities in it as 'hostages' to guarantee India's good behaviour towards her Muslim minority. But just as the division had been forced upon Jinnah by the same argument he used for the Partition of colonial India, so too did the Mahatma reject sectioning the provinces on the same grounds that he refused to countenance the country's division, saying that 'one kind of Partition did not justify another'. And while this could have meant handing Punjab and Bengal to Pakistan in their entirety, it would also have resulted in that country being deprived of an absolute Muslim majority, which might well have been Jinnah's desire as well."[63]

There have been books which have attempted to challenge the new orthodoxy set out by Ayesha Jalal in her path-breaking scholarship in 1985.[64] Relying on his speeches literally does a disservice to understanding the quicksands of the politics of that time and the intriguing complexity of the man.

I believe that Jinnah used the demand for Pakistan as a bargaining counter for entrenched rights in a federal configuration. From the time of the Lucknow Pact, he was overly anxious to protect the rights of Muslims in majority Hindu provinces, even at the cost of Muslims in majority provinces such as Punjab and Bengal. Delhi and Uttar Pradesh were the epicentres of North Indian Muslim culture and for political reasons, Bombay was important.

It beggars belief that the Muslims of these areas would be attracted to the prospect of uprooting themselves to exist as exiles in an alien land or to live on sufferance as second-class citizens in India. Both prospects were unappealing, and the only plausible construction one could put on his strategy was acquiring a modicum of parity at the Centre, which is what the Cabinet Mission Plan promised, to ensure some leverage against the Hindu Right.

In discussing Jinnah and the Partition, one is also forced to consider the colonial role. Ishtiaq Ahmed, a Pakistani political scientist,[65] posits the role the British played in supporting Jinnah. The fact that the Congress did not support the war effort and adopted the Quit India Movement from over 1942 allowed Jinnah to momentarily emerge as an ally of the British. While Ahmed argues that Jinnah was dependent on British support, there is a paucity of evidence to support this.

With regard to this, there is a deliberate conflation of the issue of the interests of the West, particularly in connection with Soviet-controlled Central Asia, acute suspicion of Nehru's Leftist sympathies and the alleged support for Partition. Whilst it may have suited the interests of the West to have a pliable ally in Pakistan as a buffer state on the Soviet border with Karachi as a significant port in the Indian Ocean, with air bases and troops whenever required, it is a bit of a stretch to assume that the British were central in bringing about such a deliverance. This also absolves the Congress and the Hindu Right of the blame they so richly deserve.

### *Mountbatten*

Mountbatten, a man singularly ill-suited as a Viceroy, was tasked with a highly complex situation in relation to a sub-continent that he had very little knowledge of. This ignorance, compounded by an acute distrust for experts and Governors of prominent provinces and ICS officers and his desire to impose his own intuition and gut feeling, was the source of many problems which persist to this day. He was in a hurry and felt the need to get the job done within an impossible timeline regardless of the consequences. He was also extraordinarily indiscreet and never hid his visceral repugnance for Jinnah who he described as "most frigid haughty and disdainful."[66] This prejudice has been brilliantly articulated by Andrew Roberts who pinpoints how Mountbatten's partiality for Nehru and his dislike for Jinnah affected the terms of the final settlement.[67] The fact that V.P. Menon in his capacity as Mountbatten's Constitutional advisor was attached to the Congress attended all the staff meetings with no Muslim being present was indubitably partial. As Robert puts it, "Time and again

carrots were dangled for Nehru, whereas Jinnah only experienced its stick."[68] As an aside, this is a factor the Hindu Right find difficult to digest, that it was Nehru's relationship with Mountbatten and, certainly Edwina Mountbatten, that smoothed the path for the creation of India in its present form, including the prize of Jammu & Kashmir which would have not been possible without the covert support of the Viceroy, a point which Andrew Roberts remarks on, stating that "Mountbatten's bias in favour of India seems all the more extraordinary in view of his wife's love affair with Nehru."

The main charge against Mountbatten was his manic desire to speed up the process of handing over power and he himself confessed that the sense of urgency took hold of him at once and never left.[69] This intent was epitomised in his 3 June plan which brought forward the date of transfer of power originally envisaged by Attlee as no later than the end of June 1948 to August 1947. The timing of the transfer—the midnight of the 14/15 of August—was chosen by Mountbatten as it was the second anniversary of the Japanese surrender. It has been suggested by Richard Hough in his biography of Mountbatten[70], that the Viceroy had timed the handing over in order to get back to London to attend the Royal Wedding between his nephew Philip and Princess Elizabeth.

It was widely commented that the timescale involved had the effect of aggravating the Punjab disturbances. This was certainly the view of Sir George Cunningham, the former Governor of the Northwest Frontier and private Secretary of the Viceroy.[71] In his words, the violence in the Punjab was directly attributable to Mountbatten's unwisdom in accelerating the date of Partition so suddenly.

Where the British must bear the blame and one which has not been adequately commented on is for not mitigating the excesses of the Partition violence. In this context, the role of Mountbatten assumes importance. The British exit from India was deliberately hurried as they were aware of the impending violence and wanted to avoid responsibility and blame. The British Governor of the Punjab, Evan Jenkins, had been sending urgent messages to London warning of the coming conflagration, violence and turmoil, so they were fully apprised of the situation.[72] Hodson seeks to contextualise this by emphasising the general breakdown of civil government in

Punjab which he ascribed to the growing communalisation amongst Indians both in the armed forces and in Government.[73] This may be true, but it does not quite explain the extraordinary haste in the passing of the final Act of Parliament which, in the words of Yasmin Khan, "unhooked India from its Imperial master." She observes that "it is difficult to avoid the damning conclusion that, in the minds of British policy-makers, the duty to protect the lives of South Asians had already ended."[74]

An important factor which is rarely remarked upon, but is well articulated in Alex Von Tunzelmann's analysis[75] is the matter of the wherewithal. Apart from the perfidies of Mountbatten, the real constraints on Imperial policy were resources. The British public had voted for the Labour Party in 1945 by a landslide indubitably demonstrating the desire to put domestic British interests first and to firmly repudiate the imperialist ambitions and delusions of Churchill. As Alex Von Tunzelmann puts it "the British government was in the middle of its worst financial crisis since the Great Depression… hundreds of thousands had been killed and millions expended. Their normal industries had been battered, their towns destroyed, and their families broken up and stuck back together. Still, they languished under the strictures of rationing, which were getting tighter, not looser. To these ordinary people, the Empire was a superfluous accoutrement."[76] This is a pragmatic assessment of the position but one distinctly at odds with Mountbatten's extravagantly grandiose representations and assurances regarding the matter of security the British *imperium* offered in the event of the violent dislocation of society predicted by the Colonial Governors at the time. Mountbatten's solution to mitigate British culpability was to deliberately delay announcing the Punjab Award until after 15th August 1947, so that the blame for the inevitable bloodshed would be borne by the incoming Government.

I think it is appropriate to quote Ayesha Jalal's conclusion about Mountbatten's triumphalism. She states, "While Punjab writhed and turned under the impact of decisions taken in distant places, Mountbatten boldly claimed credit for having accomplished, in less than two and a half months, one of the 'greatest administrative operations in history'. On behalf of the Hindus, Sikhs and Muslims

who were slaughtered in their hundreds of thousands, and the refugees who in their millions stumbled fearfully across the frontiers of the two States, the historian has a duty to challenge Mountbatten's contention and ask whether this 'great operation' was not in fact an ignominious scuttle enabling the British to extricate themselves from the awkward responsibility of presiding over India's communal madness."[77]

I believe that the most perceptive and balanced judgement on the Partition and its responsibility was given by one of the greatest Indian jurists of the time, Sir Chimanlal Harilal Setalvad.[78] He stated:

> In 1947 it's futile to attempt to hide the naked truth by saying that force of circumstances has compelled the Congress to accept the Partition of India and they had to submit to the inevitable. The circumstances were of their own creation, and what had once been warded off was made inevitable by their own deeds. The cherished boon of a united India had fallen into their lap, but they by their own want of political wisdom threw it out and made it beyond their reach…What has happened is indeed a great personal triumph for Mr. Jinnah. Within seven years after the Lahore Pakistan resolution of 1940, he has succeeded in defeating a great political organisation of sixty years' standing with the backing of the large majority of the Indian people. But has he succeeded in doing good to the Muslims themselves and to his country? …this division of India has laid the foundations of interminable quarrels and chaos which will bring untold suffering to generations yet unborn.

This is a very prescient observation as to how the future would unfold; Jinnah had indeed won a pyrrhic victory. His high-risk gamble in the bid to secure parity and Federalism had failed, and he had to confront the solution he had pleaded for but never imagined would happen. He became the prisoner of his own stratagem and at the tragic and enduring cost to his co-religionists.

The toxic and malign politics emanating from the United Provinces, from a history of bitter and unresolved confrontations between Hindus and Muslims in the context of a society which, notwithstanding the Muslim's numerical minority of around 25%,

exercised cultural hegemony over the State, provided a deep provocation to the Brahmin elite. This desire to eradicate a syncretic culture spilled over into poisoning Hindu-Muslim relations on a North Indian basis, transcending a grudging coexistence to ignite disaffection, violence and bitterness which persist to this day between the Hindu and the Muslim and the Indian and the Pakistani.

## PART II

# THE POLITICAL AND CULTURAL CONSEQUENCES OF PARTITION

# 5

# THE RISE OF THE COW BELT

Partition changed not only the borders of India, but the character of the new State as it increased the political heft and privileged the cow belt. It was in UP, that the Hindu-Muslim struggles were the most salient prior to Partition and where caste competitiveness was most compelling in determining the contours and idiom of future political discourse.

The politics of UP during that period was the decisive factor in the creation of Pakistan, as many of the issues which form the fault lines and fissures between the Hindu and Muslim communities in North India were found in the cow belt as early as the nineteenth century—the ban on cow slaughter, the Ayodhya dispute over the Ram temple as well as instances of mosques being built over temples and the Urdu-Hindi confrontation. The attacks on *namaz* (prayers) by playing music outside mosques constituted persistent irritants between the two communities, even in the nineteenth century. This has been remarked upon by Francis Robinson in his study on Muslim Separatism and, more recently, by William Gould in his seminal work, *Hindu Nationalism and the Language of Politics in Late Colonial India*.[1]

UP and Bihar were peculiar, in the words of Jim Masselos as there was "a synthesis of Islamic and Hindu cultures…in such cities such

as Allahabad and Banaras (known as Varanasi), it was the Muslims who constituted the dominant elite. Here, where the language of government offices and law courts was Urdu… the Muslims were at an advantage."[2] It was this cultural hegemony that Hindu society, led by Brahmins belonging to the Congress party sought to challenge and displace and which laid the foundation for the demonisation of the Muslims. Even in pre-independence times, the intent of the Hindu Right was to consolidate Hindus against the Muslims.

The primacy of this politics arose from the importance which the cow belt enjoyed in independent India. The structure of caste and the position of the Muslims were different in the other two large States which were divided by reason of Partition, Punjab and Bengal. After Partition, though East Punjab and West Bengal became part of India, they did not enjoy the same influence that they did in Pre-Partition undivided India.

The Partition of Punjab and Bengal had huge implications for the future of India and in ways which were unintended. For these large, rich and intellectually significant states, the Partition diminished them greatly. Lahore was called the 'Paris of the East' and was a great centre of education and culture, theatre, music and even a fledgling film industry; it reigned as one of the pre-eminent cities in India. Punjab's tribal configurations trumped religion as Roger Ballard put it "that all religious practices in Punjab, whether Sikhism, Hinduism or Islam, shared common beliefs, traditions and lived experiences. The 1881 census, for instance, revealed that a majority of jat or birdari's (caste or kinship or in the words of British colonialists' tribal groups) included Hindu, Sikh and Muslim members."[3] This view of notion of '*Biradari*' was encapsulated in the remarks of Malik Khizar Hayat Tiwana, the former Premier of Punjab and Leader of the Unionist party of Punjab who virulently opposed the Partition of the Punjab province. He told Jinnah, "There are Hindu and Sikh Tiwanas who are my relatives. I go to their weddings and other ceremonies. How can I possibly regard them as coming from another country?"[4]

Calcutta was the birthplace of the Bengali Renaissance and the administrative capital of British India until 1911. Apart from its frenetic intellectual vibrancy, it was a significant port and commercial centre for Colonial India. It was also the site of a number of important

reform movements in relation to the Hindu religion including the *Brahmo Samaj*.

The *Bhadralok*, in a sense, defined early nationalism and made the important distinction between the material and the spiritual, something unknown in the rest of India. This was part of the Bengali Renaissance which questioned religious traditions and adopted with great alacrity modern science, history, literature and Western education, the leading figures of which were M.N. Roy, Tagore and Vidyasagar. The notion of the private self-being central to the identity of the modern individual was truly remarkable in that it quarantined religious practices and rituals into a private domestic space within the family. The only time that this demarcation is violated is at the time of the *puja* ceremonies once a year. The Bengali outlook both in terms of caste and religion, particularly religion in public life was altogether different from that of the upper caste Hindus in the United Provinces, where religion impinged on all elements of public life.

In political terms, today the population of undivided Punjab would be around 168 million people and the population of an undivided Bengal would be over 200 million people. These states would have been a huge buffer to the malign politics which originated from UP and would have had a certain linguistic and cultural autonomy and character which would have assisted a more federal system to emerge. It is also relevant that these states were not obviously Congress states. They had powerful regional parties, the Unionist Party in Punjab and in particularly East Bengal, there was the Krishak Praja Party (KPP) led by the charismatic A.K. Fazlul Haq, who played an enormous role in pushing through reforms in land and education. Many have suggested that Bangladesh has progressed today because of the reforms put in place by Haq in the 1940s. The Congress did have a presence in Bengal through the Bose brothers, but it didn't enjoy the brute hegemony which it enjoyed in the cow belt. Perhaps this influenced the Congress leadership on Partition as with partitioning these two states, it substantially guaranteed the continuance of the Congress as a political force in India post-independence.

Once Punjab and Bengal were divided by Partition, the contours of the Indian Republic and its politics became apparent; they largely mirrored the ideology and prejudices of the Indo-Gangetic plain which had an inexorable predilection towards communal and caste politics and cultural revanchism. We see this in the unending desire to reclaim temples and find the source of the mythical river Saraswati and other such fetishes.

It is critical to understand that the new nationalism, whilst paying lip service to Vinayak Savarkar, deviates from his thinking. Savarkar was not interested in elevating the cow, this being very much the fetish of the cow belt. It is not an accident that the lightning rod which propelled the Bharatiya Janata Party (BJP) to its current hegemony started with the Ayodhya movement and it is hugely symbolic of this journey that we see the Prime Minister of a *soi-disant* secular state inaugurating the new Ram Temple at Ayodhya and the new corridor in Kashi (Varanasi) with great pomp and ceremony as a national event of seminal importance. According to Pratap Bhanu Mehta, "UP has been critical to the public staging of the Hindutva Project in a way that is not true of other states. The project of communalising all of India is central to the BJP but the symbolic significances of Ayodhya, Kashi, and Mathura as performances of Hindu unity and as a wedge around which to consolidate a communal consciousness cannot be underestimated."[5]

### *The United Provinces*

The United Provinces have been described as "an artifact it was formed gradually by conquest and annexation…"[6] Starting in 1775 when Lord Wellesley acquired the lower Doab (the Doab being the land between Ganga and Jamuna), Rohilkhand and Gorakhpur. There were further conquests and annexations until the British imposed their sovereignty in 49 districts.

The United Provinces had boasted many of the past glories of Muslim rule, with Delhi on the West as the seat of the Moghuls; Jaunpur capital of the Sharqi rulers; Fatehpur Sikhri, founded by Akbar; Agra the city associated with Shah Jahan and the Taj; Bareilly was the seat of the Rohilla kingdom; Faizabad and Lucknow fell

under the Nawabs of Oudh. With these royal courts, there was a cornucopia of culture and high art, music, poetry and architecture which formed the very essence of Islamic civilisation in India. If this was the case, UP also housed some of the most consequential centres of Hinduism, Prayag (Allahabad) where the confluence of the sacred Ganges meets with the Jamuna; Ayodhya the birthplace of Lord Ram; Haridwar the site of the Kumbh Mela and Mathura associated with Lord Krishna. It is easy to see fissures between the cultural heartlands of the Muslims of North India and the sacred spaces of the Hindus.

It was not just the cultural factor but also religious tropes that endowed and suffused the Indo-Gangetic Plain with a divine sacrilegious quality for the Muslims. As Christophe Jaffrelot puts it, "Traditional Hindus claim the territory below the Himalayan arch is their holy land. Muslims could now feel the same because of the Indian sites where the Sufi Saints were buried were endowed with sacredness too."[7] The Muslim kings invested in these local shrines, calling such pilgrimages 'Ziyarat', and visits would involve a donation and grants to such 'Sufi Silsilas'. This is a factor many people ignore, transfixed by Savarkar's observation that Indian Muslims only genuflect before Mecca and pointedly ignoring popular shrines like Ajmer Sharif in Rajasthan, Hazarat Nizamuddin in Delhi, and myriad shrines and holy places throughout UP and Bihar. Similarly, two of South Asia's most vaunted institutions of Islamic learning—the 'Dar al-Ulum' of Deoband and the 'Dar al-Ulum' of Nadwat al-Ulama, Lucknow, are both located in UP and both these institutions have flourished in recent times with profoundly regressive agendas.

UP was distinguished by its peculiar caste configuration, as the upper castes, such as the Brahmins, Kshatriyas and Baniyas, amounted to around 20% of the population, many of whom had a traditional antagonism to the Muslims who comprised around 25% of the population. This antagonism has manifested in several forms including the matter of cow slaughter. If the religious argument for banning cow slaughter is at best dubious, the political impetus for this policy was the means to consolidate the lower castes against the Muslims. A factor pointed out by Sudha Pai and Sajjan Kumar is what they describe as "the delayed development of Dalit consciousness

among the large mass of persons described as untouchables", which distinguished UP from the West and the South of India and enabled the upper castes in co-opting what we now describe as Dalits into an expansive Hindu identity.[8]

Francis Robinson traces the disputes between the Muslims and Hindus in UP to the development of urban administration and elections to these bodies in the late nineteenth century. These bodies were great sources of patronage in contracts for fast-developing urban conglomerations, and those Municipal Boards replaced the traditional Kotwals, who were invariably Muslim. With elections, the Chairman of the Municipal Boards had an important role to play in areas such as sanitation. As Robinson remarks, "Under the guise of hygienic management of slaughter houses and kabab shops, Hindus could defend the cow and impose their standards on Muslims, while, for the Muslims, the maintenance of their right to slaughter cows and cut them could become a symbol of their ability to protect their religion and culture."[9] He also highlights the growth of *Nagari* (the Devanagari script) as being widely adopted in the late nineteenth century in UP much to the chagrin of the Muslims and some upper caste Hindus, as another example of discord. These were presentiments of future conflicts and were a consequence of a growing Hindu assertiveness and an increasing Muslim defensiveness and fear for the future.

There were also economic forces at work, many of the poorer Muslims were weavers by trade, something they took great pride in, and were termed 'Julahas'. They were readily distinguishable and what we find in colonial records and Gazettes in the middle to late nineteenth century is a curated image of bigoted and aggressive Julahas in instigating communal riots. The economic catalyst was the loss of status of the Julahas, partly because of rise in cotton prices, the introduction of the factory system and the substitution of the Aristocratic Courts by shopkeepers and merchants. According to Gyanendra Pandey,

> This stereotype as we know it appears to have been forged in UP. This fact is surely not unrelated to the recurrent conflicts over religious practice and ritual precedence in this region that we

> have noticed earlier, and the fact that exclusively Muslim political organisations of a modern kind found their earliest roots here.[10]

These economic dislocations and immiseration of the Julahas were compounded by cultural wars which had been simmering from the nineteenth century; it did not take much to spark a communal conflagration. In 1931, Kanpur witnessed a most bloody and vicious riot which was occasioned by what the Muslims complained of as being the activities of Hindu preachers. As Gould puts it, "Most of this evidence related to the late 1920s and the Arya Samaj campaign of shuddhi, or purification. But the continual use of religious rhetoric to propagate Congress ideas in the early 1930s must have created more immediate associations."[11]

The shock of the Kanpur riots was instrumental in the drafting of the then Karachi Resolution of fundamental rights in 1931 and the new rights included the right to cultural autonomy and the right to equal educational facilities. This was of particular relevance to UP as that was the very cauldron of these cultural wars. The Mahatma himself moved the Resolution and made the distinction between Aryan and Islamic cultures, pleading for tolerance. He pinned his banner to the notion of 'religious neutrality' which meant that State neutrality was to be adopted in religious affairs.

UP played a central role in the Partition of India as there was a failure to find accommodation between the two communities. The assertiveness of the Brahmin Congress leaders such as Madan Mohan Malviya and Govind Vallabh Pant as well as Dr. Sampurnanand (a Kayasth) expressed an implacable desire to remove all vestiges of Muslim culture, forced many nationalist Muslims on the backfoot. This is rarely discussed, rather the narrative is focused on the alleged separatist tendencies of the Muslims, but little thought is given to why such separatism arose in the first place. If some accommodation was given to Urdu, much of the constituency of the League in UP would have vanished.

What is fascinating is much of the work done by Paul Brass which makes the point that, contrary to the stereotypical image of the sleepy backward Muslim community, the Muslims of UP were urbanising much faster than Hindus in the half-century until 1931,

thus making it easier for the Muslim League to recruit young urban Muslims which they did in substantial numbers. They were able to win over half of the Muslim votes in 1937 and 71% in 1946. According to Pratinav Anil, "The Muslims were mobilising faster than Hindus were assimilating them. Put differently, nationalist Muslims were very rapidly being put out of business by separatist Muslims". This is an interesting point based on solid data. For example, Anil refers to the case of 100,000 Urdu-speaking Muslim students emigrating from the countryside to cities where there only existed 20,000 places in Hindi Medium Institutions, which "meant that the balance 80,000 students would create Urdu ones."[12] These factors, urbanisation, literacy and employment metamorphosed a community into a putative nation.

### *The History of Uttar Pradesh*

It is perplexing that the state of Uttar Pradesh has retained the acronym UP from the old United Provinces and difficult to understand why it was not divided to ensure a better representation of several linguistic traditions. It is only some 60 districts which address the needs of over 241 million people. The old British creation of the United Provinces included, in the Northwest, a large part of what we now know as Haryana which became the PEPSU States before Punjab was further divided to create the new state of Haryana. The hill areas now comprising the state of Uttarakhand were also taken away from UP in recent times. But, barring these divisions, the original state remains largely intact, although it includes distinct areas which have different demographics and sub-cultures such as the Bundelkhand which extends to Madhya Pradesh, Western UP which has much in common with Haryana, Eastern UP where the local dialects including Bhojpuri are very pronounced and Oudh, the central part of UP. It is a testament to UP's political importance that this further subdivision has not occurred. It also speaks to the desire of the Hindi-speaking belt to retain some degree of hegemony in the North, through the imposition of the Brahmin Sanskrit culture at the cost of many subcultures and languages.

In the States Reorganisation Committee in the 1950s, there were disagreements as to what should be done with UP, given its humongous size and dominance. K.M. Panikkar was of the view that UP was so large and densely populated that it posed a challenge to the political equipoise of the federation. In fact, he plainly stated that it was "likely to undermine the federal structure itself and thereby be a danger to a unity of the country."[13] Panikkar had proposed Partitioning the State into five separate areas. Dr. Ambedkar was also troubled by the size and dominance of UP and suggested that it be divided three ways, the western area being Meerut, the central area having its capital in Kanpur and the eastern part the capital of Allahabad. The reasons he gave were very prescient, that such divisions were necessary to counter the "consolidation of the north and Balkanisation of south" as well as a "safeguard to the minorities."[14]

Despite these dissenting voices, the then Chief Minister of UP, G.B. Pant was supportive of the view that the State represented an unbreakable culture and religious integrity that was the heart of India, and championed the preservation of the State along colonial lines. Pant played a signal role in preserving UP, as a State, post-independence. He became the Union Home Minister in 1955 and was responsible for implementing the States Reorganisation Act, 1956 and he ensured that there was no division of the state as other members had argued.

Therefore, apart from some minor changes in the Northwest of the state and the hill areas which became Uttarakhand, the British demarcations remained largely intact together with the accession of three Princely States, Tehri Garhwal, Banaras and Rampur. This territory comprises of at least 4 different linguistic areas namely: Awadi, Braj Bhasha, Kannauji and Bhojpuri to the east. The fact that this state has not been further divided is also a testament to the upper caste hegemony and now the overweening desire of the new nationalism to privilege Hindi, as evidenced by the demand that Hindi be imposed as the national language. Whilst this fetish with the imposition of Hindi was largely to eradicate or marginalise Urdu, in the process it succeeded in diminishing the usage and value of these subaltern languages, literary traditions and the rich sub-cultures associated with them.

UP has produced nine Prime Ministers and the issues which we see in evidence today as being central to the new nationalism, derive from the homogenising ideology of the cow belt which proclaims the centrality of being Hindu and Hindi speaking, to the configuration of a Pan-Indian identity, as well as caste allegiances. Coupled with a warped view of secularism and a diluted and hollowed-out federal structure, this has created a politics which is both toxic and damaging for the Indian state. It proclaims an ideology which is insistently revanchist in that it looks back to a mythical past for the recovery of a loss of status and dignity, but one which offers no solutions to any of our myriad contemporary problems.

The price paid by the people of UP for this artificial construct has been ruinous. It has been argued that it is too big a state to be properly administered and certain areas such as Bundelkhand, for example, have suffered for being part of the state. This region which runs along the southwest of UP is mired in backwardness and has been insulated from whatever minimal development that has occurred in the rest of UP. According to Abhigyan Prakash, the:

> argument that UP needs to be split into many states—following the formation of Uttarakhand—arises from the lack of holistic development in the state. Better employment opportunities and better grassroots economics will ensure that the people of the state are not forced to leave it in such large numbers as they do now to look for work in other parts of India.[15]

What is missed here is a point that G.B. Pant iterated when the States Commission was in discussions in the mid-1950s, that the survival of UP in its present configuration was to reify its 'cultural and religious integrity'. It is seminal to note that this integrity encompassed the national integrity, if Hindi became the state language of UP, it is axiomatic that it would be the national language of India. According to Neera Chandhoke, this was "a narrow construction of nationalism based on an authoritative canon created as texts within the Vedic and Upanishad traditions."[16] That was indubitably a Brahmanical construct, one which destroyed and obliterated not just Urdu but regional and subaltern languages and dialects in the process of

creating the simulacrum of a national identity, the Hindu, Hindi speaking paradigm.

*The Congress in UP*

The Congress rule in UP for the first several decades of Independence was marked by a succession of Brahmin Chief Ministers who enjoyed the loyal support of Muslims, the Scheduled Castes and Dalits. Through this montage, they presented a simulacrum of an Indian identity, of an attempt to present a multi-faceted and inclusive face. Admittedly, the challenge in the 1960s, at least in UP, was from the Kulaks, the peasant parties and the Lohiates Socialists, who did not pose a threat in cultural terms, save for their fetish with Hindi and their desire to impose it as the national language. With the advent of Indira Gandhi, the splitting of the Congress Party, and a centralisation of power concomitant with the cult of a personality inexorably enfeebled the party organisation, causing, in the words of Sunil Khilnani, "a crises of the state itself and hence a crises in terms of Indian identity."[17]

The conservative nature of the representation of the Congress in North India, particularly the over-representation of the high castes in its ranks influenced its politics. According to Christophe Jaffrelot, "the massive presence of conservative upper caste notables and the intelligentsia among the party's leaders reinforced its opposition to the social reform programme of progressive elements in the leadership."[18] The Brahmin hegemony was formidable, and whilst this did not necessarily mean that every Brahmin was a reactionary, as Jaffrelot put it "but for one Nehru, there were many Malaviyas". This conservatism was buttressed by the need for money to fight elections. The Congress from its earliest days had the support of Hindu business magnates, such as the Birlas and Bajajs.

Oddly enough, according to Joya Chatterjee, the "hard right within the Congress party was bolstered by Gandhi's death, even as its reputation was damaged among the population at large. This was made clear by the victory of Purushottam Das Tandon (1882–1962) in the 1950 election to the Congress Presidency, winning by an increased share of the vote. A darling of the Hindu Right, Tandon was

an orthodox Hindu from Uttar Pradesh, with powerful anti-Muslim views." So, Chatterjee argued that the UP Congress was more or less autonomous:

> Ignoring Nehru's attempts to force it to follow the 'national' line. Full of Hindu Right-Wingers like Tandon and Charan Singh, India's new largest province promoted Hindi in the Devanagari script in schools, denied support to Urdu and took active measures to make sure that Muslims in government service, particularly policemen, were driven out of their jobs.[19]

The social conservatism prevalent in post-independence UP and the cow belt in general shaped the politics and the future of India and, sadly, continues to do so. For example, the fact that UP was largely agricultural, could not but be a factor in the refusal to tax agricultural income and place no cap on such an exemption. As the UP land reform imposed just a forty-acre ceiling on individuals, to provide land for the landless was designed to fail as there was only going to be 1.3% surplus, so there was a wealthy agricultural class who were untaxed. If you surcharge this with the tax benefits afforded to the HUFs, you were exempting the Hindu mercantile class from serious taxation, the tax base of the country was limited and narrow. In this context, the lazy arguments about Fabian socialism being the bane of the Indian economy should be seen as nothing, but a deflection from the truth that no serious redistributive programme could have been implemented without substantial fiscal support and that could hardly come from the fledgling corporate sector. The Hindu Mercantile and landed classes wanted to insulate themselves from serious taxation, and the Congress obliged.

The economist Ashoka Mody meditates on what could have been, drawing a parallel of post-independent India having a development strategy aligned with that of Japan after the Meiji Restoration,[20] one that transformed an impoverished agrarian country into becoming an industrial powerhouse in the 1920s in the span of fifty years. In fact, this development model was discussed and found a place in India's first five-year plan. However, land reforms which were critical to accelerating agricultural productivity were stymied by the kulak farmers who replaced the zamindars, leaving small farmers,

agricultural labourers and the landless in the lurch. If land reforms were not implemented, the absence of any serious attention to basic primary education in the early years had grave implications in that without such basic education and literacy, the workforce was unable to acquire skills and increase productivity even in subsistence agriculture. East Asia is remarkable for the success with which it achieved universal primary education in Japan, for example, universal primary education for girls was achieved by the 1920s. Nothing like this was replicated in North India, and even today the situation is dire. India as a nation has a literacy rate of around 80% in 2025 and needless to say there is great divergence across states, UP clocks in at 78.2% compared to 95.3% scored by Kerala.

The issue of education is seminal; Nehru is often blamed for not encouraging primary education and concentrating more on tertiary education, the IITs and IIMs for example. However, primary education was a state subject, the real issue was an economic incentive for improving education and that would only come through land reform. Educational institutions were either colonial or, if funded by Indian businesses, were seen as philanthropic: not for economic reasons. Landlords in nations where land holdings are concentrated and unequal have a vested interest in a continuous flow of cheap unskilled labour.

The concern about primary education and the government's neglect of it was clearly a case of misplaced priorities. In UP and much of North India because of the failure to implement land reforms, the incentive for a technically proficient workforce was non-existent.

Investing in people transcends the Left and Right divide. This was apparent in the 1950s when the matter of prioritising primary education was a policy which even Milton Friedmann, the Nobel prize-winning Chicago economist was in favour of and no one can accuse him of being a Lefty. In a memorandum to Nehru in 1955, he strongly advocated huge public investment in education. In his words, he argued that:

> The present writer is convinced that the fundamental problem for India is the improvement of the physical and technical quality

> of her people, the awakening of a sense of hope, the weakening of rigid social and economical arrangements, introduction of flexibility of institutions and mobility of people, the opening tip of the social and economic ladder for people of all kinds and classes.[21]

This reluctance in encouraging education was compounded immeasurably by the parochial proclivities of the commercial class, and the suffocation of the caste system. To draw a parallel, Southern Italy is an apt example. In a study of Italy in the 1950s, the American political scientist, Edward Banfield, sought to explain why the South of Italy was so much poorer in comparison to the North.[22] He attributed this difference to the intense family ties present in the South which, he argued, resulted in diminishing trust outside one's kinship group, diminished cooperation in furtherance of common public goals which resulted in lower regional prosperity. To some extent, this sums up the North Indian business class which as an institution is embedded in the HUF, growing prosperity within the family at the cost of society.

In *Why Nations Fail,* Daron Acemoglu & James A. Robinson argue that:

> While economic institutions shape economic incentives: Incentives to become educated, to save and invest, to innovate and adopt new technologies, and so on. It is the political process that determines what economic institutions people live under and it is the political institutions that determine how this process works. For example, it is the political institutions of the nations that determine the ability of citizens to control politicians and influence how they behave.[23]

It is these political institutions that are at fault. They have been so compromised that citizens are unable to influence politicians in the way citizens in successful nations are able to do. The authors go on to show that getting it wrong is not by mistake, and that "it is mostly because those in power make choices that create poverty."[24] This is an important point, and it has wide ramifications on the North-South debate, as states like UP have little in terms of institutional

frameworks, both economic and political, and appear to have no interest in developing them as the mainspring of the political agenda is othering minorities.

So, we see the reprise of Muslim baiting which was all too prevalent in the late nineteenth century and the first half of the twentieth century, as the engine for the new nationalism. In India, the force that animates this nationalism appears to be the hatred and demonisation of the minorities, particularly the Muslims, as a political strategy to unify what is termed as Hindu society, which is then encouraged to consolidate and vote for one party *en bloc*. An example of this was the choice of a most divisive and polarising figure, Yogi Adityanath, as Chief Minister of UP in 2017 when the BJP won the election by a landslide.

Yogi Adityanath was a controversial figure well before he became Chief Minister in 2017. He had a number of criminal cases registered against him including for murder and rioting. He conveniently got the state government (which he then ran) to drop these cases and now rules over a state which comprises 16% of India's population but boasts more than 25% of the national crimes against women and girls. He is infamous for his rabid communal speeches proclaiming, "If they kill one Hindu, then we will kill 100 Muslims." In order to sustain his brand of politics, he set up something known as the *'Hindu Yuva Vahini'* as a vigilante force aimed against Muslims in Gorakhpur and its surrounding districts. His politics are unashamedly communal, with vigorous action against slaughterhouses and alleged cow slaughter. In the demonstrations against the New Citizenship Law, he went to the extent of passing laws to confiscate the property of protesters, a step which the Supreme Court rightly nullified.[25] He also has the dubious record of presiding over the highest percentage of extrajudicial killings in India. In a period of three years, there have been 179 alleged criminals killed in over 10,000 encounters.[26]

UP's economic trajectory is sliding downwards during Adityanath's stewardship and his signature reforms relate to changing the names of cities. Allahabad has now become Prayagraj, Faizabad district has been renamed Ayodhya and Agra, once a Mughal capital, is to be renamed. Sudha Pai and Sajjan Kumar remark on the gravitational pull the BJP has in relation to many of the Dalit sub-

castes, despite atrocities committed against their women, by reason of the growth of the *Labharthi* (beneficiary culture), largely piloted by Modi along with development, cultural inclusion and hyper-nationalism.[27] So this is the much-lauded UP model of governance.

The UP model of governance and version of Hindutva majoritarianism is spreading and radiating outwards and changing the idiom and character of political discourse so that other states are metamorphosed into a larger UP. Harsh Mandar, the political activist, has remarked that "when Uttar Pradesh's combative Chief Minister Adityanath first weaponised the bulldozer to destroy, in a loop, the properties and the morale of Muslim citizens, other Bharatiya Janata Party chief ministers, in Madhya Pradesh, Uttarakhand and Assam, emulated him."[28] The question which arises is whether the 2024 Lok Sabha election results where the BJP suffered substantial losses in UP including the constituency of Faizabad, the location of the Ayodhya temple, undermine the argument posited in this book?

Whilst the BJP suffered a setback in UP, most of its seats continue to come from what we know as the cow belt, states like Madhya Pradesh, for example, gave full support to the BJP's agenda. In UP there were local issues at work which undermined BJP's strategy. In UP, the temple agenda was seen as a game changer as the Prime Minister thought that agitations in relation to both Gyanvapi mosque in Varanasi and Mathura's Shahi Idgah would harvest the same electoral returns as Ayodhya did. The 2024 election results cruelly laid bare the limitations of a Hindutva agenda bereft of any serious attempt to engineer economic and social development outcomes. The BJP's dog whistles regarding the minority community compelled consolidation of the Muslim vote and some Dalits, leading to their wholesale evacuation from the Bahujan Samaj Party (BSP), a party which the BJP had relied on in UP to split the Muslim and Dalit votes. The BSP only succeeded in polling less than 10% of votes, down from almost 20% in 2019.[29] In addition to the BSP debacle, there were disagreements over candidates between the Centre and the states within the BJP, with Yogi Adityanath at odds with Amit Shah and this sabotaged the election effort. Another factor which led to many hardened BJP supporters not voting was the cynical fielding by the BJP of political turncoats in many seats, a disproportionate number

of whom lost. However, the chemistry between the Congress and the Samajwadi Party (SP) proved a winning formula, with the SP and Congress bagging 43 seats compared to 33 for the BJP. These factors, in my view, proved decisive, but do not undermine the arguments of the centrality of UP and the cow belt in India's elections. BJP's performance in UP undermined its Hindutva plank, but the caste and community factors remain relevant.

*OBC Votes in UP*

From the 1960s, we encounter a mysterious category known as the OBC. These are the castes who enjoy hegemony in political terms in contemporary India and which dominate UP and Bihar politically and to which Narendra Modi owes his prime ministership. It is the OBC factor which is seminal in UP politics.

The first attempt at defining who was an OBC was by the First Backward Caste Commission in 1953, the criteria adopted to define 'backwardness' revolved around matters such as trade, occupation, education attainments and representation in Government. These criteria themselves have context in a caste-based society, where certain occupations were invariably undertaken by backward people. This Commission drew up a list of 2,299 groups which roughly approximated to 32% of the entire population. The hesitancy over the propriety of this entire exercise was epitomised by the Chairman who, at the last minute, threw up his hands castigating the report on the grounds that such a project was at odds with the paradigm of a casteless society.[30] This blatant act of renunciation by the Chairman itself questioned the very foundations of what was being sought to be achieved, that of a caste-centric schema being at variance with social justice.

Given the social and economic benefits that were conferred on an OBC status, the exercise became increasingly political, with communities being offered reservations in educational institutions and public employment in exchange for their political fealty to the party promising such advancement. In fact, the history of UP politics has been a graveyard of opportunistic alliances between communities and caste, like the Congress alliance of Brahmins,

Dalits and Muslims, Mayawati's Dalit and Brahmin alliance. The politically momentous turning point came in the 1970s with the alliance of the Lohia Socialists with Charan Singh, who represented the Jat Farmers including low castes involved in agriculture, under the rubric of *Kisan*. It was this consequential coalition that was the catalyst in bringing the first Janata Government into being at the Union level between 1977–1979. This episode led to the setting up of a Commission to look into the matter of OBC quotas, the now controversial Mandal Commission.

The second Janata Government under V.P. Singh sought to implement the Mandal Commission Report. If implemented, the Report would have greatly reshaped Indian society as it identified 3,743 groups in India as backwards, constituting 52% of the population. V.P. Singh included reservations of OBCs amounting to 27% in addition to the existing 22.5% of the SC/ST quota. The resulting conflagration between the upper castes and the OBCs resulted in the decimation of the largely upper-caste Congress in the cow belt and its substitution with OBC leaders such as the Yadavs in UP and Bihar, Mulayam Singh Yadav and Lalu Prasad Yadav being prominent faces of this new hegemony.

What is remarkable has been the success of the BJP in garnering the OBC and Dalit vote and this, to a large extent, has been the contribution of Narendra Modi along with well-directed welfare schemes and cultural inclusion. He is the second OBC Prime Minister after H.D. Deve Gowda and one who flaunts his caste origins to show that he is one of the masses, the proverbial *chaiwalla* or tea seller. This political trajectory is a consequence of the Sanskritisation of the OBCs, whereby the upper castes seek to offer positional change in caste dynamics by behaving in a culturally inclusive way with the lower castes such as the OBCs, a factor which has been prevalent in the history of UP starting in the nineteenth century.

Sanskritisation has been discredited in certain circles as being ineffective in that it doesn't really effect social transformation. As M.S. Srinivas states "the mobility associated with Sanskritisation results only in positional changes in the system and does not lead to any structural change. That is, a caste moves up above its neighbours and another comes down, but all this takes place in an essentially

stable hierarchical order. The system itself does not change." [31] So, this process actually reifies the existing power structure and the values that sustain traditional Hinduism. Christophe Jaffrelot draws a valid distinction between the lower castes of North India who in his words "tend to remain imbued with ethos of Sanskritisation or with that of spiritual, other worldly equality" and this he contrasts with those of the South and West of India who have been able to "emancipate themselves with collective mobilisation using primarily the idiom of ethnicity." [32]

Under Narendra Modi, the BJP has been far more politically adroit at managing the antinomies of being, on the one hand, an upper caste, pro-business party as well as assiduously promoting an image of also being a mass party pushing an ambitious social justice agenda. To this extent, the political machinations represent the acute political insight of both Modi and Shah. After surveying the post-Mandal political scenario with the entrenchment of the Yadavs both in UP and Bihar as well as Mayawati, the Dalit leader, who was the Chief Minister from 2007–2012, this identity leadership after decades in power had become corrupt, despotic and complacent. Modi and Shah encouraged the political aspirations of other marginalised OBC and Dalit sub-castes such as the Pasi, Balmikis and others whose causes they championed. They managed this through a stratagem which aligned with their politics the complete exclusion of Muslims from social mobility projects. Not that there were any such programmes in place, but with parties like the All India *Majlis-e-Ittehadul Muslimeen* demanding reservations for Muslims, it suited the BJP to conjure this communal binary. This strategy energised the social justice platform coupled with various well-directed welfare programs which had a disproportionate impact amongst the OBCs, morphing social justice politics into the fulcrum for Hindu unity.

Whilst ostensibly privileging it's OBC base, the BJP was not indifferent to the claims of it's upper caste constituency; it passed further legislation to address what it termed *'economic backwardness'*; a category detached from caste, offering 10% quotas for Economically Weaker Sections (EWS), thus entitling non-OBCs to the benefit of quotas. The significance of the 103rd Amendment by Prime Minister Modi is commented upon by Abhinav Chandrachud, calling it

"a substantial departure from the scheme of the Constitution." He further states, "the Government has excluded Scheduled Castes, Scheduled Tribes, and Other Backward Classes from EWS reservations, essentially implying that this is only a upper-caste reservation."[33]

However, the real shame of this allegedly social justice agenda is the manner in which it deflects the narrative from real issues of social mobility and opportunity. The beneficiary culture is no substitute for education and skilling, and it demonstrates that the political class is wholly indifferent to outcomes. As Pratap Bhanu Mehta put it incisively "In my years of dealing with higher education, it was rare to come across a social justice party that shed a single tear for the decimation of public education or the destruction of universities. But all their social justice outrage was focused on the one single point of reservations."[34] If this thinking is regressive, the new nationalist agenda is far worse, in that it continues with the indifference to quality in education, but seeks to impose the straitjacket of the Hindutva ideology to curricula as well as scrutinising the political acceptability of academics surcharged by the capacity of the Centre to now appoint Vice-Chancellors of state universities.

It must be noted that the social justice agenda occurs at a time when the Union Government has been promoting neo-liberal economic policies of privatisation and disestablishing the public sector. These are precisely the activities which would attenuate jobs in the public sector. The real issue for those ostensibly keen on caste quotas is to extend it to the private sector. This is opposed by many on the plea of merit. However, studies have shown that in the case of Indian Railways for example, productivity had improved with a higher proportion of SC/ST employees in senior positions,[35] thus making this merit argument problematic.

### *Demographics and the primacy of the Cow Belt*

The lynchpin of this political strategy is to follow the demographics in North India in the states of UP, Bihar and Madhya Pradesh which buy into the Hindutva, toxic nationalist narratives in a way, for example, the Southern states, with the possible exception of Karnataka, have

not. The reasons for this are not hard to see; these Northern states are trailing behind by all applicable developmental criteria. The actual states of UP and Bihar are the most salient manifestation of poor to non-existent governance is clear when one makes international comparisons as if they were independent countries. Shekhar Gupta states that:

> if Bihar was a nation, it would likely rank at 184 out of 195 in terms of GDP. Population is no mitigation factor as Bihar had a larger population than all the nations which are listed from 185 to 195 including Niger, Eritrea, Afghanistan, Sierra Leone and Somalia. UP is slightly better, if it were a nation it would rank at 172 competing with powerhouses such as Mali, Tanzania and Togo."[36] Gupta concludes that "India might have more people in extreme poverty than all of Sub-Saharan Africa put together and on most social indicators. It is a lot of poor and poorly governed people.[37]

Whilst this depressing litany of statistics captures only some of the parameters of deprivation, poverty and inequality, they cannot truly convey the granular, all-pervasive despair and sense of hopelessness.

The disparities in population growth are also remarkable. For example, in 1951, Tamil Nadu's population was marginally higher than Bihar's; but 60 years later Bihar's population is one and a half times Tamil Nadu's population. In fact, the population increase in the cow belt has reached a stage where UP and Bihar constitute 23% of India's population and are expected to grow by 12% and 20% respectively in the next 15 years. It is relevant that most states in India have stabilised their Total Fertility Rate (TFR) and have attained below replacement figures such as West Bengal, Andhra Pradesh and Tamil Nadu which have reached a TFR of 1.6 in 2017 whilst the cow belt states have a higher than replacement TFR; UP had a TFR of 3.0 and Bihar of 3.2.[38]

This factor of the high rate of population growth in the Northern states and the declining population growth in the Southern states is likely to be addressed in political terms by an increase in the representation of the Northern states commensurate with their populations. This exercise has been held in abeyance and has been

termed delimitation. In 1976, the parliamentary seats were frozen in accordance with the 1971 census by way of a Constitutional amendment which was to extend till 2000. The reason for these indefinite postponements relates to the very tangible concern of the need to prioritise family planning and not to reward states which do not properly implement such policies. However, delimitation was further extended to 2026, so currently the parliamentary seat representation is determined by a population census taken over 50 years ago.

It is to be expected that this government will insist on delimitation for entrenching its brand of politics which has greater purchase in the cow belt. If delimitation comes about, there is a projected increase in the Lok Sabha seat figure to around 848 seats in comparison to 543 today, and if the Government chooses to allot the seats on the basis of current population figures, we would be looking at UP increasing its seat allocation from the current 80 seats to 143 seats. In contrast, Kerala would continue to have 20 seats in the Lok Sabha.[39] So one can see that the voice of the South is diminished and that of the North increased. Unfortunately, this is the mandate of Article 82 of the Constitution.

For many Lok Sabha constituencies in the cow belt, the current situation is considered unfair as their populations have grown; but their representation has not. In UP, MPs have a constituency of around 2.5 million people, in Bihar it increases to 2.6 million, in Tamil Nadu it is only 1.8 million and in Kerala, it is barely 1.7 million.

Gopalkrishna Gandhi states that such a radical change in the character of Parliament warrants serious consideration. He makes the point that the South has contributed much to parliamentary discourse and to diminish that contribution would be to demean Parliament. He further suggests that there are two alternatives before the Government. The first would be to continue to freeze the electorates at 1971 levels until all states have achieved population stabilisation. The other would be to devise a mathematical formula, like the Cambridge Compromise, based on a sophisticated mathematically equitable formula which was used by the EU for the apportionment of seats for the European Parliament between

member states. Gandhi accepts that the formula there was bespoke, and we would need to devise our own formula. He concludes that "we need to limit population, not representation."[40]

This matter of representation is further complicated by the fact that there is an asymmetry in the matter of financial contribution as the Southern states have been complaining that they contribute far more to the Union Finances per capita than the cow belt states, but receive far less in terms of funding from the Centre.[41]

The 15th Finance Commission has been complicit in ensuring that UP and Bihar receive more in financial assistance than their entitlement in earlier determinations. The Finance Commissions traditionally have adopted particular weights such as population, fiscal discipline and improved infrastructure in calculating disbursements. It is pertinent to note that in the 15th Finance Commission the population weightage had been shifted from the base of 1971 to 2011; this is convenient for UP as it has the highest population of 241 million. It receives more financial benefit on these criteria, leaving it without any incentive to seriously implement family planning.

In addition to the demographic factors, the single largest criterion for weightage amounting to 45% is what is termed 'income distance'. This calculation is made on the distance or divergence of a state's Gross State Domestic Product (GSDP) assessed over a three-year period. The problem with this assessment is that it was calculated using the 2011 population at each stage. As Nilakantan R.S. concludes, "About 72.5 per cent of the overall weightage in the horizontal devolution criteria either explicitly favours the high-population states or is a proxy favouring high–population states. Worse, all of it is based on the 2011 population data". This, of course, has had highly prejudicial effects on the Southern states which have been successful in keeping population figures down: so, for instance, the allocation for Tamil Nadu has fallen by 23.1% from the 12th to the 15th Finance Commissions.[42]

It is relevant that UP and Bihar have consistently been privileged, that their chronic failure of development is concealed under a carapace of opacity, hiding important aspects of the state development in order to enhance the weightage it would receive under the Finance Commission. In doing so, the Union Government

has deliberately manipulated and diluted the data for this purpose. To take one example, there is the matter of measurement of literacy. In UP, literacy levels appear to have increased substantially from 1951 to 2011, from around 12% to 68%. However, one must be wary of such figures as the definition India employs to define a literate person as an outlier. To be considered literate in India one only has to be able to read and write their own name; this requires a very limited notion of the alphabet. If your name is Shiv, for example, you only need to know four letters. The Annual Status of Education Report (ASER) released in January 2024 shows that more than 50% of 14 to 18-year-old children in rural India are unable to solve a simple three-digit division problem that is taught in Class 3. Literacy skills are not much better as from the same sample over 25% were unable to read Class 2 level textbooks and just shy of 50% could not read sentences in English. Of those who could read, 26.5% did not understand what they were reading.[43] These are very damning statistics and point to an impending disaster arising from population growth, rather than the much-vaunted demographic dividend economists and politicians envisage.

In this context, the priorities of the State Government and particularly that of UP are relevant. In 2022, a new school session commenced in UP and school children were bereft of school books as the government alleged it had insufficient funds to float a tender. School teachers complained that in the absence of new books, they had to collect books from the children of the previous school session. However, the UP Government seems to have ample funds for spending on religious affairs. The Department of Religious Affairs had forwarded a budget of 1,100 crores for FY 2022–23. This is to be contrasted with the more parsimonious allocations in previous years, a paltry 32.5 crores was spent in 2017–18 which rose to INR 604.88 crores in 2021–22.[44]

These priorities have to be seen in the light of this vainglorious narrative the Union Government seeks to project regarding the incipient digital and knowledge economy. This seems rather fanciful given the absence of any desire to inculcate basic skills of literacy and numeracy; post-Covid some 51,000 government schools have shut down without any express intention of replacing them.[45] There

is much excitement about digital learning, but this disregards the fact that only around 50% of Indian households have access to the internet, and that figure is only 37% in rural India.[46] So, it is evident that education is not a priority and whatever resources the UP Government has, are directed for the purpose of promoting greater religiosity, that portends the future of the cow belt. With the grandiose consecration of the Ram temple at Ayodhya, the theme of religious tourism is being projected as the '*desiderata*' for UP in terms of business and employment generation, something the electorate even in Faizabad roundly rejected in 2024.

This is the preparatory ground for the emergence of a significant politician from the cow belt, a national leader, post the present Prime Minister, like Yogi Adityanath who has shown great fidelity to the principles of Hindutva. Post the 2024 elections and an apparent falling out between Yogi and the Centre, this trajectory does not seem as self-evident as it was, and much will hinge on the State elections in 2027.

With the emergence of the cow belt as the cynosure for the new nationalism, and with the prospect of delimitation looming, one discerns a new and unsettling diffidence amongst public intellectuals as well as politicians from the South on the inviolability of the formula of 'One Man, One Vote', the signature tune of majoritarianism. In fact, what Gopalkrishna Gandhi has urged is postponing any delimitation until the cow belt's population growth comes under control (which may be never) or clever contrivances such as the 'Cambridge Compromise' look suspiciously like the concerns Ivor Jennings, the Constitutional lawyer had alluded to in the 1950s, that in a post-colonial society, "a narrow franchise, indirect elections, tribal representations may all be quite sensible."[47]

But this is the very essence of the new nationalism which projects an overriding belief in majoritarianism, as if the vote on any issue by the majority, no matter how absurd or discriminatory, the outcome should be upheld. In this context, it is worthwhile to ponder on the words of Lord Sumption[48] when he meditates on the meaning of majority rule. He concedes that:

> Majority rule is the basic principle of democracy. But that only means that a majority is enough to authorise the State's acts. It is not enough to make them legitimate. This is because majority rule is no more than a rule of decision. It does nothing to accommodate our differences. It just restates them in numerical terms. Democracies cannot operate on the basis that a bare majority takes one hundred percent of the political spoils. If it did, it would harbour large and permanently disaffected groups in their midst, who had no common bonds to transcend their differences with the majority. A state based on that principle would quickly cease to be a political community."

This is a chilling reminder of what will happen if we continue to go down this road of majoritarian politics. Politics necessarily involves a discourse between people whose views differ; it is forever the art of the possible. Isaiah Berlin spoke of 'temporising compromises' over political experimentation; some compromise with the party who you may disagree with.

Given the prevalence of caste-based politics, we now enter the era Nivedita Menon characterises as birth-based majorities. She comments that:

> A permanent birth-based majority is the very antithesis of democracy, for it is based on two problematic assumptions—that a small group claiming to represent that majority can permanently direct public policy, and that the birth-based group is homogeneous in its interests. A majoritarian politics is entirely directed towards shoring up both these assumptions and attempting to silence any questioning of them.[49]

This can be tested by the fact that barring recently, the cow belt enjoyed the political hegemony of one party from independence for 40 years and the BJP appears to have substituted the Congress in that position today. This prospect may be upended by the 2024 election results providing the opposition remains united.

In this process, the wider notion of the public good is lost, as Ambedkar put it pithily, "fraternity is the root of democracy"[50] and as such, the basis of a political society.

6

# LANGUAGE AND CULTURE

## TOWARDS PURITY

Language is more vital and organic to people than inanimate objects and a source of great culture in terms of prose, poetry, and drama. It is essentially a liberating force in that it allows for the fullest expression of feelings, moods and thoughts. As George Steiner put it, "No two languages, no two dialects or local idioms within a language, identify, designate, map their worlds in the same way. The memories stored, the empirical surroundings inventoried, the social relations which the language organises and mirrors (kinship, for example), the colours distinguished in its vocabulary of perceptions, differ, often radically, from tongue to tongue."[1] Language was a seminal part and integral to the cultural fabric of India; to protect languages is to protect plurality and cultural diversity.

When the Constitution was being drafted, the notion of cultural rights, particularly special cultural rights of minorities, was admittedly inchoate. The question was whether minorities would be guaranteed freedom in the matter of religion, language and culture and be protected from discrimination and interference of the State. The Congress had supported a policy of preservation of minority culture, script and language as early as the Karachi Resolution in 1931.

However, Dr. Ambedkar, the Chairman of the Drafting Committee, saw the role of the State in the preservation of culture to be limited. Rochana Bajpai sums it up by stating, "The form in which cultural safeguards were eventually incorporated in the Constitution was that minorities were free to promote their culture with the possibility, but not an entitlement, to assistance from the state."[2] So the role of the State was negligible. It was to play no active hand in assisting the minority to preserve its culture and linguistic heritage.

This insouciance for the preservation of culture is disturbing in a society which ostensibly strove for pluralism, as in most cases assimilation is tantamount to annihilation. Contemporary thinking has privileged the notion of cultural preservation in a multi-cultural society. For the Muslims of UP and Bihar, the importance of Urdu was seminal. Yet successive Congress Governments in the 1950s and 1960s in UP were actively negating the minority linguistic culture and heritage, despite legislation which was to be used to assist the cause of Urdu. This will be substantiated later, but the matter of the rights to cultural preservation was vital.

This policy should be looked at in a historical backdrop where Persian was the primary language of the North Indian elite and Urdu was most definitely an Indian language. Francesca Orsini traces the development of Urdu to the nineteenth century, it was then that "Urdu took over the mantle from Persian."[3] At that time, it was certainly not identified with Muslims, although it was identified with the upper classes. In UP, apart from the Muslims, it was widely spoken by the Kayasths, Khatris and, of course, the Kashmiri Pandits.[4] Nehru, for example, wrote in Urdu through the 1950s and only towards the early sixties he changed to Devnagari. In fact, according to Alok Rai, in North India, in 1900 Urdu was, in his words, "overwhelmingly the language of public discourse."

In fact, Santosh Kumar Khare wrote "the notion of Hindi and Urdu as two distinct languages crystallised at Fort William College in the first half of the nineteenth century."[5] He further suggested that "their linguistic and literary repertoires were built up accordingly, Urdu borrowing from Persian/Arabic and Hindi from Sanskrit." However, the crux of his argument is something which would disturb most proponents of Hindi which is that "modern Hindi (or Khari Boli)

was an artificial construct of the East India Company which, while preserving the grammar and diction of Urdu, cleansed it of 'foreign and rustic' words and substituted them with Sanskrit synonyms." It is paradoxical that it is the RSS, the foremost protagonist of Hindi today, that takes great pleasure in deriding English speakers in India as 'Macaulay's children'. At any rate, the RSS position on Urdu was hostile, ridiculing the idea that Urdu the language of a minority of UP should be privileged in any way.

But, in a way, the position of the Urdu speakers of UP mirrors the plight of the 'Bhadralok' in Bengal, when the Communal Award was announced in 1936. A memorial was issued to Lord Zetland by the Bhadralok Community which began with the pleading that, "Your memorialists belong to the Hindu Community of Bengal which constitutes a Minority Community and, as such, is entitled to the same protection as was guaranteed to the Minorities of Other Provinces."[6] It is interesting to note that in the name of *'culture'*, which anyway was an amorphous term as it did not include language, the Bhadralok spoke about Federalism and then Partition when the issue of a United Bengal was proposed in 1946.

The Muslims of UP or, at least the *'Ashraf'* (upper classes), have been vilified for insisting on the retention of Urdu, as it was considered unreasonable for a small elite to privilege high culture and eventually insist on Partition as the solution. There was always the possibility of compromise and there was no reason why Urdu could not have been retained as a second language in UP instead of Sanskrit which hardly anyone speaks. Yet no one draws the parallel with the Bhadralok in Bengal who succeeded in dividing the province because of paranoia about cultural subjugation. Why was it unreasonable for the Ashraf to insist on Urdu and not unreasonable for the Bhadralok to demand Partition on the grounds of cultural subjugation by people who they considered inferior?

We do not appreciate sufficiently how systematically Urdu has been erased from daily life in North India. As Mushirul Hasan states that "The Pro-Hindi lobby, which was vocal in the Constituent Assembly, had its way."[7] Seth Govind Das stated, "The Hindi-Hindustani controversy has come to an end simply because Article 99 of the Constitution refers to 'Hindi or English' alone in relation

to the transaction of business in our Parliament. Thus, the question of Hindustani exists no more." The UP Board of High School and intermediate education decided on Hindi as the sole medium for writing in the High School examinations from 1953 onwards. In order to make it even more difficult for Urdu speakers to transmit their patrimony to their children, the UP and Bihar Governments suspended aid to Urdu medium schools. Hasan conceded that Nehru was deeply disturbed by this virulently anti-Urdu policy, but there was little he could do. He confessed, "If my colleagues do not agree, I cannot help it."[8]

The real death knell for Urdu was the three-language formula in schools. In UP, this consisted of the national language, Hindi first, with the second language being Sanskrit and the third being a choice between English and Urdu. For those who wish to forge ahead in life, learning English as a language was critical and few Muslims or, those from Urdu-speaking backgrounds, could hardly be blamed for choosing English over Urdu. But manifestly the three-language formula was skewed in favour of Hindi and Sanskrit with a clear intent to consign Urdu to the dustbin of history.

Urdu did have its votaries amongst upper-class Hindus such as Sir Tej Bahadur Sapru, who, as stated above, favoured the continuance of Urdu as the official language of North India. He was acutely suspicious of Hindi as he suspected that it was merely a ploy to Sanskritise Hindustani to remove many Urdu words and usages. It must be said that there were many Hindu writers of eminence who wrote in Urdu such as Munshi Premchand, Firaq Gorakhpuri, Pandit Hari Chand 'Aktar', and Anand Narain Mulla amongst others. It was a secular bridge between the communities, apart from being great art and high culture.

It is not as if Urdu was being replaced by something popular and vibrant. Hindi was and is, dead and bureaucratic. As Octavio Paz, the poet and Nobel Laureate, a former Mexican Ambassador to India wrote, "The Hindi that has been imposed on present-day India has yet a further disadvantage: it is a language that has suppressed foreign voices, whether English, Persian or Arabic; in their place it has inserted Sanskrit neologisms. It is as though the English were to purge their language of all words of French origin because they

are relics of the Norman invasion. The truth is that very few people fully understand official Hindi, which has become an affected and bureaucratic dialect. In order for 'High Hindi' (as some call it, sarcastically) to become a living language, it must submerge itself in popular speech and accept the voices of outsiders, no matter what their origin. Living languages are hybrids and impure."[9] The intent was clear, erase Urdu to prejudice Muslims and attack the composite culture, nothing else.

Retaining Urdu as a second language in UP would have been in keeping with the mandate of Article 29 of the Constitution which explicitly protected the right of any group to nurture their language and culture. In UP, which was its birthplace, Urdu represented a civilisation, literature and a culture deserving not just protection, but pride. It was also the mother tongue of 20% or more of the population. Professor Faizan Mustafa has pointed out that under Article 350(A), the State Government was mandated to provide facilities for instructions at a primary stage and under Article 350(B) there was a requirement for the appointment of a special officer for linguistic minorities. Yet in UP, nothing was done as it was dishonestly identified as a language of a religious minority whose culture was required to be marginalised, if not eradicated. In fact, UP went further and even banned Urdu medium schooling altogether, something which was not even done in states like Maharashtra. The famous Urdu writer, Shamsur Rahman Faruqi was quite blunt about this: that there was an effort to extirpate Urdu in UP post-independence.[10]

There have been attempts to say that the Hindu Right was not being unreasonable in their desire to rid UP of Urdu.[11] It was said that the Urdu script was not easy and, despite centuries of use in the North by Muslims and Hindus alike, Devanagari was a more practical language and easier to write. This may sound plausible and divest the debate of anti-Muslim animus, but for one thing: the acrimonious debate over numerals. The Hindi supporters pointedly refused to accept the Western Arabic numerals of 0,1,2,3,4, etc., which are in use today and insisted that the Devanagari numerals be adopted. The reason, although it has not been stated as such, was, according to Gyanesh Kudiasya 'their Islamic provenance.'[12] If the

West had no difficulty in adopting the Arabic numerals, it is difficult to see a reason for rejection by the Hindi supporters other than a visceral hatred and a desire to vaporise the Islamic patrimony. India came very close to officially adopting the Devanagari numerals on 26 August 1949, after a tied vote of 74/74. Nehru's intervention prevented this; he stated that the Devanagari numerals should not be forced on the country by such a slim margin.[13] I raise this example as it epitomises the attitude of many of the Hindu Right towards the Muslim heritage and one that was particularly apparent in UP, a point that underwrites the argument that there was little or no appetite on their part to come to any sensible arrangement on cultural matters with a large and entrenched minority.

This implacable insistence on removing Urdu carries significant implications, because with a language comes its literature, and with that literature comes a rich cultural heritage—what George Steiner referred to as a cultural patrimony.[14] In Urdu, there have been cases of translating Urdu poetry into Devanagari as well as the Roman script, notably by Professor K.C. Kandy and other gifted translators, but it is not easy and invariably a literature disappears with the degradation or diminution of its script.

This is clearly apparent in another Indic language which is spoken by over 35 million people worldwide and particularly a community which, despite its small number in India, has played a disproportionate role at the forefront of enterprise, wealth creation and philanthropy, the Sindhi community. The Sindhi language is written in several scripts including Perso-Arabic. Some of the greatest poets and writers of Sindhi literature such as Shah Abdul Latif Bhittai have written in this script, adumbrating Sindhi folklore and traditions. It is a profound tragedy that many young Sindhis are denied the opportunity of imbibing the grandeur of their literature and syncretic heritage by reason of the bigoted desire to eradicate the traditional script and replace it with a script in which there is little Sindhi literature to speak of.

The curious aspect of this is the fact that when India attained independence, Hindi was made the official language of Government, with English being given an interim status. However, the victory of the 'Hindiwalas' was, in the words of Francesca Orsini, "pyrrhic", as

it could never substitute English as can be seen from the popularity of English in primary and secondary education, even in the Hindi-speaking states. Many, if not all, votaries of Hindi sent their children to English-speaking schools.

Paradoxically, notwithstanding the clear desire of the Hindu Right to eradicate Urdu, Shoaib Daniyal, states that, "demotic Urdu along with a substantial part of its Persian loans still lives on in India."[15] This was in large part the influence of Bollywood. In fact, it is this Hindustani that bridges the gulf between the North and the South much more efficaciously than an arid bureaucratic Hindi does.

### *Towards a Pure Culture*

Since 2014, the desire to rid Indian culture of what is represented as foreign has proceeded apace. Narendra Modi's references to 800 years of slavery, the obsession with name changing of cities and the rewriting of history books points to the reality that the discredited two-nation theory has been resurrected. The government wants to purify Indian culture of what it sees as foreign elements.

Though name changing, for instance, has been a recurrent feature of governments in the sub-continent, it has been largely changing colonial names to names which resonate locally. So, in Pakistan Punjab, Lyallpur has become Faisalabad, Calcutta has become Kolkata, Bombay has become Mumbai, and Madras has become Chennai. However, until recently Mughal names were generally considered Indian names and not changed. Now, particularly in UP, there has been a spree in name changing, so Allahabad has been renamed Prayagraj, and Faizabad district has become Ayodhya district, which shows the unalloyed intent is to depict Mughal rule as colonial and foreign as British rule.

This aligns with treating the artificial constructs of India and Pakistan as civilisational entities with their distinct histories and traditions which have little to do with each other, and is to go down the Pakistan road, to become a 'Hindu Pakistan'.

There has been a whole rash of books which have sought to provide some intellectual credibility to the Hindutva narrative, the two-nation theory and the need for cultural purification.

*The New Idea of India*[16] written by Harsh Madhusudan and Rajeev Mantri presents and showcases the argument for a new concept of nationalism, one that is closely aligned to religion and what is described as a "civilisational ethos". In this book, there is an attempt to change the discourse, to distance the narrative from the originalist thinking of the Constitution makers such as Nehru and Ambedkar which was based on the Western principles of liberty, fraternity and equality and preferred to use the nativist idiom of '*dharma*' as being the schema of government. The writers argue that there should be a shift of focus from the Gujarat model to the UP model which is much lauded as being the future path of India with fulsome praise and accolades being showered on Yogi Adityanath. There is also an audacious attempt to depict the Moghuls and other Muslim rulers as colonists by persons such as Sai Deepak Iyer, an engineer turned lawyer, who has been prolific in his publications and has argued that Islam imposed colonialism on India. We have another engineer and banker, Vikram Sampath, who has completed a biography of V.D. Savarkar. He has also been critical of historical methodology. There is also Sanjeev Sanyal, an ex-banker and now an advisor to the Union Government who has been writing on Indian history through the prism of Hindutva.

All of these authors are interesting in that they purport to set out a serious and informed case for the new nationalism and its cultural agenda. But what is apparent from the trajectory of this nationalism is that the idea of the civilisational ethos is lauded, but not for quite the right reasons. This is apparent in one of the most evocative sentences in 'the New Idea of India' where it is stated that "of all the modern states in existence today India represents the pinnacle of syncretic polytheism and Pakistan probably the most unrestrained instincts of proselytising monotheism. All the Urdu shayari, music and tasty kebabs and all the Gods of our pantheon cannot change that reality any time." This statement is a giveaway in its crass reductive caricature of culture and what constitutes a civilisation, the discipline of history and cultural studies evades the authors, with their crudely communal slant, unfortunately much of this is camouflaged by reference to decolonisation.

As Pratap Bhanu Mehta has commented, the term 'decolonisation' has become "the ideological flavour of the moment." It has been the imperative behind a variety of actions such as, in his words, "calls to restructure education, to re-write laws, reconceptualise history, reimagine public spaces." This language aligns with modernity and trendy post-colonialism jargon and detracts from what it really is which is an attempt at cultural purification, something which the Left accuse fascists of doing. But if you remove this despised colonial heritage, what do you replace it with? As Pratap Bhanu Mehta puts it incisively, "The purpose of the invocation is not a real diagnosis of Indic knowledge or even a programme for its regeneration. It is to mark the boundaries of exclusion and inclusion."[17]

Coming to which, we have to go to the maestro of this cultural laundromat, one of the greatest ideologues of Hindutva, V.D. Savarkar, who the authors quote liberally and with much approval. He drew a crucial distinction between Hindus and the other inhabitants of the territory, the Muslims in particular. In his tract *Hindutva: Who is a Hindu?*[18] he defines a Hindu to mean a person who regards this land of *Bharatvarsha*, from the Indus to the seas as his Fatherland and Holy Land. This is plainly an exclusionary definition as Muslims were seen as persons who regarded their holy land as Mecca and Medina, and the Christians, Jerusalem or Rome. This is not dissimilar to European fascism of the 1920s and 1930s which singled out Jews for harbouring international or, at least, extra-territorial loyalties, leaving them open to the charge that they can never be truly patriotic to their home country.

Savarkar saw the purpose of nationhood for Hindus to create a state for the development of a specifically Hindu identity. He recognised that the Muslims constituted another nation and used the term "two nations" liberally. In this regard, as his seminal book *Hindutva* was published in 1923, at a time when Jinnah was identified as a secular hero and lauded for his nationalism, Savarkar with his strait-jacketed notion of nationalism and Hindu identity foreshadowed much of Jinnah's later rhetoric. Subsequent to his book on Hindutva and the passing of the momentous Lahore Resolution in 1940, Savarkar in a press conference in Nagpur in 1943 stated plainly: "I have no quarrel with Mr Jinnah's two nation theory. We Hindus are a nation

by ourselves and it is a historic fact that Hindus and Muslims are two nations." This may come as a surprise to those who subscribe to the view that it was only Jinnah and the Muslim League who were votaries of the two-nation theory.

Curiously, Savarkar was not a devout Hindu; he was in fact an atheist but he had the genius to see the infinite possibilities in building a nation on the basis of a specifically Hindu identity. This identity rested much on a shared culture, one that necessarily was based on Sanskrit and what he described as "common laws and rites". These factors would exclude more than one-half of pre-Partition India, the Muslims, the Scheduled Castes, the tribal population, the Sikhs and the Christians. The obvious question is how minorities would be treated within this manifestly majoritarian construct. Whilst Savarkar does not properly articulate his vision for minorities in any of his writings, in an interview he gave to an American journalist, Tom Treanor, in 1944 when he headed the Hindu Mahasabha he told him that, "the Muslims will have the position of negroes in your country."[19] Given the quasi-apartheid conditions which were pervasive in the US in the 1940s, this would not have been a very appealing prospect to the Muslims.

Savarkar was not being flippant when he recognised that whilst there may be two nations on one soil, the only solution was homogeneity. He was not interested in any attempt at power-sharing or minority rights: only brute majoritarianism. There would have to be uniform laws governing all the inhabitants of the territory without difference and they should be based on the Hindu culture and religion. This was where Savarkar departed from the Congress consensus at the time which at least paid lip service to plurality and unity in diversity. It is interesting to note what Dr. Ambedkar had to say on this:

> The scheme of Swaraj formulated by Mr. Savarkar will give the Hindus an empire over the Muslims and thereby satisfy their vanity… But it can never ensure a stable and peaceful future for the Hindus, for the simple reason that the Muslims will never yield willing obedience to so dreadful an alternative.[20]

The intent of this nationalism is to divest Indian civilisation of the Islamic influence, whether it be in terms of language, art, architecture, music, apparel, textiles or food. This toxic nationalism then takes on the trajectory of a cultural war and to very little purpose.

The India of the 2020s is a very different place from when the Hindutva of Savarkar was written, in the 1920s, over 100 years ago. It is far richer and cosmopolitan, with a growing middle class who have an unquenchable appetite for the best the world has to offer. The desire to set up a cultural construct which is purportedly free of all foreign influences is a fool's errand; it is an impossible task. In the age of the internet, with a large Non Resident Indian (NRI) population, the growth of access to international culture such as art, music, literature, cinema, streaming channels, food, social media and myriad apps all make for multiple cultural interactions from which people derive pleasure and which are integral to their daily quotidian existence. This is the reality these cultural warriors have to address.

The unstated aim of this culture war is not just to diminish and marginalise the Islamic past, but to glorify a conveniently unknown past as *Bharatvarsha*, the ancient India which all nationalists privilege as the real India and one which very little is known about other than inscriptions, some architecture, pillars, columns and, of course, the great epics. This can be usefully contrasted with ancient China which had a very detailed history in terms of manuscripts and records. This *Bharatvarsha* is a blank canvas on which there have been attempts at inscribing a past, it is a kind of palimpsest on which anything can be written or embellished, including carefully curated mythologies.

The documented medieval period—which has far more relevance to our daily lives than a distant mythological chimera—is sought to be erased as that period is denigrated for not being truly Indian, or what is really meant, Hindu. The authors of *The New Idea of India* refer disparagingly to "tasty kebabs" implying they are a foreign import, but what about the humble samosa (Uzbek Samsa) or the jalebi (Iranian Jallebi), which we consider very much Indian, but are the culinary patrimony of Mughal rule as well as the pulao and biryani which are amongst the most popular dishes in India.

In fact, this notion that you repudiate a culture because it is associated with a political context such as invasion and what you conceive as humiliation, is a rather perverse way of looking at things. The primary issue should be the extent to which such a culture has enriched your life and has added value to it. As Martin Puchner puts it very persuasively,

> None of the ancient works or their creators discussed here are without blemish. The cultures that shaped them had values and practices different from our own; they were products of societies few of us would like to live in. Like the societies that produced them, these works carry the values and injustices of their eras. Considering them worth preserving, and accepting them as part of our common cultural heritage, does not require that we agree with the values of their era or single them out as moral examples to be emulated in the here and now.[21]

This exposes an oddly woke argument that these ostensibly Right-Wing nationalist pseudo-historians seek to invoke.

I believe that India is a vessel of what Kwame Anthony Appiah calls 'cultural contamination'. He cites Salman Rushdie, who argued in his controversial novel *The Satanic Verses*, that it is an idea which,

> Celebrates hybridity, impurity, intermingling, the transformation that comes of new and unexpected combinations of human beings, cultures, ideas, politics, movies, songs. It rejoices in mongrelisation and fears the absolutism of the Pure. Melange, hotchpotch, a bit of this and a bit of that is how newness enters the world. It is the great possibility that mass migration gives the world, and I have tried to embrace it.[22]

Behind this desire to reclaim what is considered to be their Hindu patrimony, is the belief in ownership. This matter of cultural patrimony raises a whole set of new issues and should be addressed. As the philosopher Kwame Anthony Appiah puts it, "a great deal of what people who wish to protect as cultural patrimony was made up before the modern system of nations came into being, by members of societies that no longer exist. People die when their bodies die. Cultures, by contrast, can die without physical extinction."[23] If so,

is there any way we can privilege the descendants of a particular people as having a greater claim on such a patrimony?

This is a seminal point, as the location of artefacts may remain constant, but the people change. The ruins of Ephesus situated in modern Turkey are an example of this. They are clearly Greek in provenance, but they are located near Izmir in Turkey, and the people who live there now are largely of Central Asian origin. Who has a claim on these ruins, the Greeks or the Turks? It may be best to view these structures and artefacts as belonging to our universal patrimony, making it difficult to nationalise such cultural artefacts in the way the Hindu Right have. In simple terms, if you can't claim ownership, on what basis can you allege a wrong?

In fact, as a persuasive rebuttal to the argument of cultural appropriation, Martin Puchner argues that "culture is not a possession, but something we hand down so that others may use it in their own way; culture is a vast recycling project in which small fragments from the past are retrieved to generate new and surprising ways of meaning-making".[24] Puchner concedes that such cultural interactions were invariably accompanied by violence but cultures under assault developed astonishing strategies of resistance and resilience; he argues that cultural transmission has led to the creation of new forms of culture and the world has benefitted.

The force that animates and powers the Hindutva project is the desire to expunge all traces of the Muslim patrimony, a period extending over 800 years and one embedded in the North Indian psyche, language, lifestyle and sensibilities. In the process of this is the attempt to unify Hindu society, as Menon states, "There is no single majority religious community in India. Hindutva is the latest stage in the millennia-old attempt to produce one."[25]

7

# THE WEAPONISATION OF HISTORY TO UNDERPIN NATIONALISM

According to Fukuyama, the teaching of history together with residency laws and immigration is one of the building blocks of citizenship; what children learn about the past is important to the society one wishes to aspire to. The centrality of history to citizenship and identity assumes much greater signification than one would normally assign, particularly in contemporary times. Jason Stanley argues that "authoritarian regimes find history profoundly threatening… these regimes find ways of erasing or concealing history in order to consolidate their power." He draws a comparison with democracy which requires:

> The recognition of a shared reality that consists of multiple perspectives. Through exposure to multiple perspectives, citizens learn to regard one another as equal contributors to a national narrative. And they learn, we learn, to accept that this narrative is open to continued reflection and reimagination, constantly taking into account new ideas, new evidence, new perspectives and theoretical framings. History in a democracy is not static, not mythic, but dynamic and critical.

This he contrasts with authoritarians who mispresent history "as a single story, a single perspective,"[1] which in India means Hindu victimhood and Muslim barbarism.

Post-independence governments have largely removed vestiges of the colonial past. The NDA Government wants to extend this policy of the removal of symbols of what they term 'tyranny' and 'enslavement' to Islamic monuments and cultural artefacts, to serve an openly political agenda, to marginalise and ultimately eradicate the Muslim contribution to Indian culture. It has sought to identify and target the Muslim legacy as a colonial legacy, a departure from the earlier nationalism which saw the Muslim contribution to Indian culture as integral to it.

In India, it becomes easier to push this desire for a pure imagined culture for several reasons. History is not treated with gravitas as an intellectual discipline, so when state governments interfere in the writing of school textbooks, the bogey of the Left-Wing historian is paraded to allow them to do so with impunity. There were no established historical works which predate the Muslim conquests other than chronologies and inscriptions, so history can be treated as a palimpsest to create the distant past in the image of the present, transfixed by the Hindu/Muslim binary. It becomes easier to demonise and caricature the past and to seek to correct the alleged wrongs of the other and purify history.

### *Ancient Indian Culture and Its Understanding of History*

Often, the argument is that the Hindus had no historians and thus were at a disadvantage when narrating their own history. This is too simplistic an understanding as there is serious doubt as to whether ancient Indian culture had a historical sense at all. A number of orientalist scholars and even votaries of the Hindu Right, such as V.S. Naipaul, have commented on whether Hindu thought and philosophy had any proper understanding of history as an intellectual discipline as understood by Western and Islamic thinkers. Richard Lannoy remarks that:

> This very marked and (deeply felt) indifference to the Western concept of history and of man's incapacity to change is far more consistent than in most other civilizations, including the Chinese and the Islamic. The durability of the cyclical-time concept at the most advanced levels of Hindu metaphysical thought makes this indifference to what we would call history one of the distinguishing traits of the Indian cultural tradition.[2]

However, having accepted the cyclical time concept, this does not preclude the return to roots or the mythical golden age thinking. In fact, Lannoy argues that this mythical golden age is "built into the very fabric of religious belief, as they once were in Christian Europe."[3]

### *The Hindutva Version of the Role of History*

This issue of whether Hindus had a historical sense has immediate contemporary resonance as one of the principal projects of the new nationalism is to endow and suffuse Indians with an elevated sense of pride in themselves as a people and banish what they characterise as the shame of defeat and, even slavery, at the hands of Muslim conquerors. Much blame is attributed to Marxist historians who are alleged to have distorted Indian history.

The reality is that with the greater vernacularisation of Indian education from the late 1970s, someone like V.D. Mahajan was a more popular and well-known historian who has had a much greater influence on the study of history in most schools and colleges than any of these Left-Wing panjandrums, other than in the elite institutions like JNU which, in any case, is preaching to the converted.

In a valid criticism of the Left historians, William Dalrymple, complains that they depopulated history of personalities and made it distinctly reader-unfriendly by concentrating on economic movements and data in a depressingly turgid style rather than dwelling on the character and foibles of Kings, Queens and Generals, the charming tapestry of life.[4] They made history boring with state backing by the Congress nationalists. He may be correct, but even in the West, many academic historians are heavy-going and

it was only through Historians who had the flair to write well like G.M. Trevelyan, A.J.P. Taylor and others that the reading of history became more pleasurable and popular.

It is not as if the Hindutva thinkers have an issue with the state patronage of historians. Their idea of the role of history is for it to serve as the handmaiden of political ends, and as such it is very state-centric. This is only confirmed by Rudrangshu Mukherjee when he observed,

> Another kind of objection has come from the Sangh Parivar, which has no reservations to either the state being involved in history-writing or to using history for nation-building. They also have no objections to projecting the nation in heroic terms. They only want the secular nation to become a Hindu nation, secular heroes to be replaced by Hindu heroes.[5]

The complaint is not about the matter of the state patronage of the writing of history.

Whilst every age may choose to put a different interpretation on events, these interpretations arise from new facts, sources, archives, materials and many new interpretations arise from new source material which previous historians may have never examined and one cannot be cavalier about corroborated facts and assume that interpretation is everything.

In 2022, the Union Government has attempted to make serious changes in the drafting of a National Curriculum Framework which will govern the State Education Boards. This exercise is to rewrite school textbooks and, given the predilections of the BJP / RSS, history is high on the agenda. The intent is plain, to remove "unhistorical facts and distortions about national heroes." What it really attempts to do is far more insidious and regressive as it seeks to change the historical discourse, valorising ancient history and addressing the controversial medieval period, not in terms of how history has evolved, but to hark back to violence, invasions and warfare. The idea is reductive, to make history a Hindu-Muslim binary, so an example of this is the well-documented activities by the Moghuls of translating the Sanskrit texts of the Mahabharat and the Ramayana into Persian to be excised, as they are part of the composite cultural traditions. The

intent is to deliberately hollow out the history of any contemporary relevance it may have, to prepare the student to understand how the modern world evolved in terms of culture, language, economics, architecture, and apparel and reduce it to a militaristic binary, such as the history taught to school children of my generation, of Kings and Queens, except through the narrow prism of nationalism and Hindutva.

It is not as if the Hindutva historians are unique in this worldview. Pakistan also has an appalling reputation as regards the state rewriting history textbooks to subserve its Islamic ideology. Pakistani textbooks do not, for example, even cover the existence of East Pakistan until 1971. The extraordinary and egregious significance given to Muhammad Bin Qasim's raid into Sindh in the ninth century is emblematic of the desire to Arabise the history of Muslims in India and to emphasise military achievements. There is a fetish with military accomplishments rather than lauding the values of diplomacy, trade, building of consensus and co-opting local rulers and notables into the Moghul Government.[6] It is for this reason that the Moghuls other than Aurangzeb are not valourised in Pakistani history. The Moghuls are now seeking to be erased from the annals of Indian history because they were not Hindu; and in Pakistan because they were not Muslim enough.

### *The Out of India Theory*

I believe that the most reliable test on whether the persons who subscribe to the Hindutva narrative are being honest is when they address the controversy of the Aryan migration.

It is here that not only does one encounter more than a tinge of racial superiority not dissimilar to Nazi Germany; but an egregious case of cultural appropriation where the Indus Valley Civilisation is claimed to be integral to the Aryan-Hindu culture. M.S. Golwalkar, the second Chief of the RSS, claims, "We—Hindus—have been in undisputed and undisturbed possession of this land for over 8,000, or even 10,000 years before the land was invaded by any foreign race."[7] He goes on further to identify Hindus with Aryans, confusing ethnicity with religion. This runs contrary to orthodoxy which shows

conclusively that the modern human race, the homo sapiens, came from Africa and then spread and populated different parts of the world. The race theory propagated by Hindutva has been discredited all over the world. However, it is the reigning doctrine as well as official historiography in India in the University Grants Commission (UGC) syllabus.

This most egregious refusal to accept the Aryan invasion as a historical fact is central to the Hindutva argument as it would reduce Hindus to the status of invaders or, at least, migrants, not very different from the Muslims they so abhor and despise. Tony Joseph relies on DNA studies amongst other data to demonstrate India to be what he calls "a multi-source civilisation not a single source one,"[8] the Aryans being the last of the significant migrations. He concludes his work with the line, "we are all Indians; we are all migrants." Much of his work is derived from a major genetic study titled *Genetic Evidence for Recent Population Mixture in India*. The report was based on the genome data from 73 population groups in the Indian sub-continent from 2200 BCE to 100 CE.

Notwithstanding this formidable research and, perhaps as a reaction to it, Prime Minister Narendra Modi commissioned a Committee in 2017 to go into this issue, the stated purpose being to identify Hindus as being the original inhabitants of India. Of course, that is the last we have heard of it, but it demonstrates how important history is to validate this nationalism and portray Muslims as invaders. But where does this visceral hatred of Muslims come from? Most Indian nationalists were nurtured on history written by colonial historians who had their own agenda.

### *Colonial Historiography*

The matter of historiography is important as many of the great textbooks on Indian history produced in the late nineteenth and early twentieth century had a seminal influence on perceptions of the medieval period. Peter Hardy was dismissive of a number of popular historians such as Vincent Smith, Sir Wolseley Haig and Sir Jadunath Sarkar, accusing them of uniformly "narrating the history of medieval times as a succession of battles, rebellions and of depositions of one

Muslim soldier of fortune by another."[9] These were, in Hardy's eyes, old fashioned approaches:

> The working hypotheses of most modern historians- that a society must be studied in its own terms and that all aspects of the life of a people, a society or civilisation are to be assumed to be interconnected and interdependent- seem not have greatly influenced… [their studies] of medieval Indian history.[10]

One of the great developments in modern historiography ushered in by the twentieth century is that the compass of history became much wider and started to deal with society at large rather than the quaint conceit that history is only to be confined to the stories of Kings and Queens. It is this solipsistic obsession with personalities in a world foreign to us, which distorts our view of history and the past.

According to Herodotus, the idea of geographical location being the most important determinant of a nation or people's fate, having ramifications on their culture and economics emerged. This concern with geography has resurfaced from time to time and the French Historian, Ferdinand Braudel, has treated this as a great tool in understanding world history. Napoleon famously said, "To know a nation's geography is to know its foreign policy."[11] North India was perennially hostage to invasions from Central Asia because of its location. These invaders and plunderers were attracted to the North Indian plains, the lush fields of Punjab and the wealth in many of the temples and urban dwellings. The problem is that the invaders are now treated as synonymous with Muslims and hence an insidious religious dimension was introduced. We must ask why there is an exclusion of the pre-Islamic period which saw waves of invaders from Central Asia and Greece, who also engaged in plunder.

The notion of geographic location does not figure as a tool of analysis in Hindutva historiography. I believe that it is essential, as one cannot understand North Indian history without this.

The colonial historians were minded to segregate the past through the prism of religion. James Mill segregated Indian history into three periods, the Hindu, the Mohammedans and the British. The British projected the flow of Indian history as being 'two great ruptures' in Indian time. The first which defined the transition to

the medieval implied a descent from an earlier 'Hindu golden age' to one of 'Mohammedan tyranny'. Richard Eaton states that this gave the British the opportunity "to imagine India's second great historical rupture- the transition from 'medieval' times (i.e. Muslim rule) to modernity (i.e. British rule)—as having validated the coming of European governance as a blessing for a benighted land."[12] Thus the British, at one fell stroke "liberated India from eight centuries of 'Muhammadan' stagnation."[13] Eaton examines how Indian society changed during this period, the buoyant economy, the cultural efflorescence caused by the interaction between the Sanskrit and Persian worlds, the emergence of the Bhakti Movement and Sikhism. In other words, it reveals what a dynamic society India was in contrast to what colonial historians would paint, a society that was depressingly static and unchanging waiting for colonial redemption.

Through this prism, the British depicted themselves as the saviours, ridding India of the Mohammedan yoke and to substantiate the argument that the eight centuries of Mohammedan rule in North India had to be presented as a period of unremitting oppression and barbarity on an unprecedented scale.

The British East India Company, now seen for good reason as the reviled exploiter and looter of India is privileged and given benediction by the Hindu Right, largely because they rely so uncritically on colonial historiography to create and embellish the anti-Muslim narrative. There was a quartet of British military scholars or scribes who were largely responsible for the creation of this new perspective; Lieutenant Colonel Alexander Dow, Lieutenant Anderson, Captain Scott and the redoubtable Lieutenant Colonel Briggs. This quartet sang the same song, as Manan Ahmed Asif put it, "extensive essays and exegeses on the origins of Muslim fanaticism and temple destruction, the character of the Hindu people and those who had been forcibly converted, as well as the ways in which the current Mughal polity was oppressing the population of British India."[14]

It is this malign outlook, which, unfortunately, skewed the common perception of medieval India. It even influenced sympathetic readers such as Jawaharlal Nehru whose *Glimpses of World History* struggles with the artifice of this simplistic binary between Akbar

and Aurangzeb as the only way of looking at Mughal rule. It is only in the post-independence era that historians started to question these colonial verities and stereotypes and were able to interrogate this historiography and show it for the sham much of it was.

There is a trend in post-modernist theory which denies there is any such thing as historical truth or objectivity, the view being that language could not relate to anything except itself must entail the dissolution of history. However, what we are confronting in India is not any sophisticated post-modernist theory, but prejudice, a bankrupt ideology and uncritical reliance on colonial texts.

The realities of Muslim rule were much more nuanced than these simplistic, reductive binaries. For example, if one were to examine the story of the Gorakhnath Math; the current Mahant being none other than Yogi Adityanath whose main political agenda is to extirpate the Mughal legacy from India, one would see a very different perspective. The Nath yogis who comprise the Gorakhnath Math had very powerful historical connections to several Mughal emperors from Babar, Akbar to Aurangzeb, and even the temple land of Gorakhnath in Gorakhpur was endowed by Nawab Asaf Ud Daula of Awadh in the eighteenth century to build the present temple complex.[15] According to Christine Marrewa Karwoski, "the Nath yogis are a heterogeneous community of ascetics that dates back to around thirteenth century and whose beliefs overlapped with Jain, Tantric, Muslim and Sikh communities."[16] Karwoski argues that the inclusivity of their message allowed for both Hindu and Muslim rituals which were attractive to many Mughal emperors. This is part of the rich tapestry of Indian history and a luminous example of many cases of such munificence which require to be acknowledged and appreciated. This is not to question cases of Muslim barbarity and intolerance, only that matters should be seen in perspective.

### *What about the South?*

We invariably look at Hindu-Muslim history in India solely through the prism of North India and invasions from Central Asia and Persia, but South India, where Hindu-Muslim relations had a very different trajectory, is largely ignored.

If one looks at the South, the relationship between Hindus and Muslims is very different. For example, the oldest mosque in India, alleged to have been built in 629 AD is at Cheraman in Kerala. The history of Hindu-Muslim relations and that of Christians in Kerala was largely influenced by trade and commerce and one which, unlike the European traders, did not encourage or lead to any form of colonialism, other than the case of the Portuguese, the English and the Dutch.

South India had a number of great dynasties, particularly the Cholas, Pallavas and the Pandyas who were not only significant and iconic builders but also conquerors. All these dynasties had conquered lands in South East Asia. The Cholas controlled territories from the Bay of Bengal to Sumatra in present-day Indonesia. Their capital was Tanjore and they built the grand Brihadewara Temple in Tanjore in 10 AD.[17] The Pallavas were responsible for the construction of the grand Mahabalipuram temple complex in the seventh and eighth century. There were also the Chalukyas who ruled over Karnataka and Southern Maharashtra and were responsible for the construction of the exquisite temple complex at Badami. They also ruled for many centuries; the Cholas for 1500 years and the Chalukyas for over 600 years.

Perhaps the most plausible reason that these Empires are not discussed as avidly is that, at least in the case of the Chola dynasty, it is inconsistent with one of the verities of Hindutva; that Hindus never invaded any country or sought to impose their religion on anyone or, for that matter, destroyed temples or engaged in pillage. The colonial aspect of Hindu rule is remarked upon by a historian of ancient India, Dr. Upinder Singh, who in her magisterial series of essays, writes that:

> One major dissatisfaction with ancient Indian history writing—perhaps its greatest one—is the fact that most of it is incredibly India centric and ignores the rest of Asia. …Scholars such as R.C. Majumdar and K.A.N. Shastri talked of Hindu political and cultural colonization of the lands of south east Asia, although they differed to some extent in the details, for instance on whether the significant Indian influences emanated from Bengal or South India.[18]

It is pertinent that Dr. Singh refers explicitly to "political and cultural colonisation" something Hindutva thinkers would be aghast at. Even nationalists, such as the great Swami Vivekananda and Mahatma Gandhi did not refer to this history. Vivekananda solemnly pronounced in Colombo in 1897 that "India has for thousands of years peacefully existed… We of all nations of the world have never been a conquering race and that blessing is on our heads."[19] So this prelapsarian view of Indian history is contested.

Ordinarily these views should not be an issue unless one subscribes to this curious amalgam of victimhood and exceptionalism that seems to be integral to the Hindutva discourse that Hindus never invaded and subjugated people. In fact, according to some nationalist thinkers, including Gandhi and Nehru, the ancient Hindus never took recourse to violence, an allegation which is wholly unsupported. Wendy Doniger puts it rather well, stating that, "Nonviolence became a cultural ideal for Hindus precisely because it holds out the last hope of a cure, all the more desirable since unattainable, for a civilization that has, like most, always suffered from chronic and terminal violence."[20] As Dr. Singh states,

> Although there were many different ideas of ancient India, it was the idealized Nehruvian model of the ancient Indian past—one in which Buddhism, Ashoka, nonviolence, and cosmopolitanism had pride of place—that were reflected in the national flag and more so, in the national emblem. This model affirmed the nonviolent ideology of Gandhian nationalism and projected a set of aspirations for India's future.

Dr. Singh finds such an understanding deficient as "it was based on a very selective reading of India's ancient history."[21] These works make it amply clear that the mythology of the non-violent Indian is precisely that, it has no basis in history.

The issue of the colonisation of areas and the matter of conversions is relevant as by avoiding confronting this aspect of history, Hindutva thinkers actively conceal some of the true glories of Hinduism. In this process of conquest, kingdoms were created, trade flourished and temples were erected to Hindu gods in Southeast Asia on a grandiloquent scale. One of the most resplendent cities of its time

was Angkor Wat, located in present-day Cambodia. Despite receiving the UNESCO accolade of the most important archaeological site in South East Asia, it hardly figures in the public's imagination.

Buddhism is the other major soft cultural export of ancient India that is forgotten. Buddhism had a seismic civilisational impact on China from the time of the Han Dynasty, over two millennia ago. One would imagine that this is something that India should be proud of, as it projects an important part of India's soft culture, and in a particularly consequential part of the world, but one would be mistaken. Constrained by Brahmanical prejudices, Buddhism is commonly viewed through that prism as an apostasy and the Hindu Right remains oddly reticent on this very critical contribution in India's interaction with China, Japan and South East Asia, as if it is something to be ashamed of.

It is relevant that many on the Hindu Right speak of converting India into a civilisational state, a state which owes its legitimacy to a civilisational core, one indubitably embedded in religion as opposed to civic citizenship which forms the basis of today's Constitution as if such a transition would be a panacea for all our problems. Such a state may correspond to the borders of contemporary India, but would pointedly fail to recognise that the Indic civilisation had a pervasive influence in South East Asia in such territories as present-day Myanmar, Cambodia, Thailand, Sri Lanka, Java and Bali. In fact, the great Sanskrit scholar Sheldon Pollock referred to this culture as the 'Sanskrit Cosmopolis'.[22] If we accept the position that Indic civilisation encompasses much more than the nation-state of India, this undermines the civilisational construct. In doing so, the proponents of the civilisational state diminish the Indic Civilisation by this fetish with only the Hindu *dharma* and purity, turning its back on an illustrious past which has been enriched by its interactions with the Persianate world. Shashi Tharoor has questioned this idea asking, "What today is Indic Civilisation? Some have argued that India is a 'civilisation-state' rather than a 'nation-state', but they anchor the idea of Indian civilisation solely in the Hindu dharma, with no regard for the multiple non-Hindu influences that have undoubtedly helped shape contemporary Indian civilisations."[23] The question to

ask them is what prompts this deep animosity towards the Muslims, particularly the Mughals that fuels this ideology?

*Were the Mughals a force for the good?*

Whilst the history of Southern India is a useful corrective to this lugubrious threnody of defeat and shame which Hindutva thinkers revel in, there is no sensible explanation as to their attitude towards the Mughals, who they have sought to excise from history. They were one of the most serious dynasties in world history, rivalling the Ottomans and the Hapsburgs in their imperial significance, wealth and cultural legacies. It is for this reason they cannot be consigned to oblivion; they are just too consequential a force on the world stage. The question is whilst no one can seriously deny their cultural achievements, as a dynasty were they a force for good or should they be just looked through the prism of invaders who stayed and enslaved the Indian masses as is now being peddled? What are the charges which are arraigned against them?

The first charge against the Mughals was that they were foreigners and invaders. This argument needs to be understood in the context of the Aryan invasion. If we accept the consensus of the new breed of historians and public intellectuals who use multi-disciplinary tools such as DNA testing and linguistics to show that the Aryans were not indigenous to India and came from Central Asia, it is evident that this "foreigner" allegation is contrary to contemporary research.

Even Sir Jadunath Sarkar,[24] one of the historians who is most identified with the Hindu Right in that he indubitably subscribed to the narrative that saw the Mughals as foreigners, was constrained to observe that "the Mughal Emperors united many provinces of India into one political unit, with uniformity of official language, administrative machinery, coinage and public service, and indeed a common type of civilization for the higher classes. They also recognized it as a duty to preserve peace and the reign of law throughout their dominions."[25] This is high praise indeed from a historian who was, until the 1950s, commonly regarded as the foremost historian of medieval India.

The Mughals have often been accused of plundering and looting India. However, this assumes that the Mughals were a colonial power. This is contentious. According to John F Richards, "…the dynasty and the empire itself became indisputably Indian. The interests and futures of all concerned were in India, not in ancestral homelands in the Middle East or Central Asia."[26] Their governance was emphatically not colonial. The Mughals who from the beginning had severed their ties with the Ferghana Valley which Babar writes so achingly about in his autobiography *The Baburnama*. It is fair to conclude, as does Parvathi Sharma in her biography of Jahangir,[27] that the Mughals have been labelled foreigners not because of their place of origin, but their Muslim identity.

What the Hindutva writers ignore is that if the Mughals were not a colonial power, it only meant that any prosperity would have to be a shared prosperity. India during the Mughal rule saw massive economic growth and prosperity. One way of measuring this extraordinary financial efflorescence was the import of silver. The sixteenth-century Indian economy was largely self-sufficient, barring silver and horses which had to be imported. The horse trade boomed, bringing great affluence along the horse-trading routes from Central Asia to India, as horses were shipped to Europe from Indian ports as well as bought by Indian rulers. Peter Frankopan has observed that the purchase of the finest steeds was not dissimilar to the "money that has flowed more recently into oil-rich states has been spent buying Ferrari, Lamborghinis and other fine cars."[28] In sharp contrast, the East India Company started to collect taxes in India of which a third of the collected monies were used to fund the purchase of Indian goods.[29] As the Indians ended up paying the East India Company from their own earnings, the amount of silver required diminished accordingly. This has been described as a huge scam, theft on a grandiose scale which was used by the British to finance their Industrial Revolution by re-exporting Indian goods to other countries and importing in turn, strategic materials such as iron, tar and timber. India in the nineteenth century saw the steady de-industrialisation of the economy at the behest of the British.

As Richard Eaton further observed,

> American silver arriving in India was immediately minted into silver rupees, which became the Mughals' principal currency medium from about 1580. In 1615 one observer estimated the Mughals' annual revenue at 120 million silver coins, compared to forty-five million for the Ottoman empire and just fifteen million for neighbouring Iran.[30]

So, the great Mughal was by far the most opulent ruler of the three gunpowder empires. He further observed that between 1600 and 1800, India absorbed about 20% of the precious metals produced throughout the world. This is really quite an achievement as this growth was on the back of the exponential rise in the exports of Indian textiles, which had effectively displaced rice and spices as the most significant item of trade in the Indian Ocean.

To finance the import of silver, large areas of North India such as Bengal developed as part of a greater intensification of land use. Even more significant was the imperial emphasis on the collection of revenue in cash which "fostered monetisation, forcing producers to go in for cash crops which had demand amongst consuming elites and markets in India and overseas."[31] This greater circulation of cash in terms of silver coins increased merchant wealth and created new markets and new interdependencies. As Eaton puts it "Bengal depended on yarn from Gujarat, Coromandel acquired its cotton from the Deccan, and Gujarat relied on raw silk transported from Bengal." These developments presaged the growth of a pan-Indian integrated economy, involving the hinterland more directly than just the coastal areas and to leap ahead of the political construct that was eventually to become India.

This growth in the textile industry was remarkable not only for its time. India had been exporting textiles from Roman times, but never on this scale. The key factor was the design, much of which emanated from Central Asia and Persia, for example, the paisley print which is so often identified as the cynosure of Indian prints actually originated from Yazd in Persia and is named after the town Paisley in Scotland. Even until 2019, the textile industry in India employed over 45 million workers, many in the informal sector. So, it cannot be said that the impact of the Mughals on the Indian

economy was transient and fleeting. According to Angus Maddison, India began to see economic growth at its highest at over 20% under the Mughals and in the eighteenth century, India overtook China as the largest economy in the world.[32]

The subsequent mercantilism the British imposed on India was horrendous, monopolistic and impoverishing, leaving Indian merchants little or no choice as they no longer had the protection of Mughal rule by the end of the eighteenth century. Adam Smith referred to this as "the mean and malignant expedients of the mercantile system,"[33] as it was a palpably rapacious policy and one which the most protean thinker on political economy excoriated. Yet, the pseudo-historians of Hindutva shamefully insist that British rule was preferable to Mughal rule. In addition to this, it is not as if this wealth was not shared with the Hindu Baniya class who benefitted commensurately, this can be seen even today in some of the resplendent havelis and temples Jain merchants built in Shahjahanabad that exist to this day.

This perversity sits very oddly with much recent historical research and writing which show the extent to which the British, through the East India Company and then the Crown, plundered India financially. Utsa Patnaik, drawing on nearly two centuries of data on tax and trade has calculated that Britain enriched itself by a total figure of US$45 trillion during the period between 1765 to 1938,[34] which is around 17 times the 2018 UK GDP. This figure has increased by a recent study by Oxfam showing the theft at around US$64 trillion.

It is relevant to note that this rapacious attitude was not just confined to the East India Company, but to the British government and well into the twentieth century. India post-independence was Britain's most substantial creditor having the maximum sterling balances amounting to £120 million in 1945, even after the most acrimonious negotiations where the British tried to reduce their liability through some very questionable tactics. These balances were reduced by the British through the insidious stratagem of sterling devaluation in 1949, something which according to B.K. Nehru, the then High Commissioner to the UK, was assured by the Bank of England that this would not take place.[35] The plain fact is that in 1947

after nearly 200 years of British rule, direct or indirect, this rapacity was reflected in the human development indices. For example, the life expectancy of an Indian in 1947 was around 32 years, it is now nearly 70 years. This was at a time when life expectancy in the UK in 1947 was in excess of 60 years. This indicates the flawed legacy left by the British at the time of independence.

*Destruction of Places of Worship*

The other charge levelled against the Mughals is the matter of destruction of places of worship, the Ram Janmbhoomi Movement being the most sensational example of this. To be fair, the charge does not relate just to the Mughals, but to all Islamic invaders from the ninth century onwards. But, this must be seen in perspective. It is not as if India is unique in experiencing such destruction or desecration of places of worship.

I believe that the destruction of iconic temples, mosques and churches is a peculiarly secular activity and is invariably guided by considerations of realpolitik. The most infamous examples of such destruction in the ancient world include the destruction of the famed city of Persepolis by Alexander the Great and the obliteration of the great Temple of Solomon in Jerusalem by the Romans in 70 AD. In Spain, the Great Mosque of Cordoba was converted into a Cathedral after the Christians conquered Cordoba. Whilst none of these acts can be condoned on any grounds, to associate the destruction of holy places with just one religion and monotheism is a transgression of history and facts.

There needs to be an understanding as to why successive rulers demolished places of worship and this includes Hindu rulers who destroyed temples. The practice of Hindu rulers destroying Buddhist temples is well documented. Even Swami Vivekananda remarked "that the Temple of Jagannath at Puri was once an ancient Buddhist shrine. We Hindus have turned that and many other Buddhist shrines into temples."[36] According to Hiuen Tsang, the seventh-century Chinese Buddhist Monk, one sixth-century Huna ruler, Mihirakula, a devotee of Shiva, destroyed 1,600 Buddhist stupas and monasteries and killed thousands of Buddhist monks and laity. This vandalism

also extended to Hindu temples by Hindu rulers. When the Cholas defeated Mahipala the Maharaja of the Pala Empire in 1025 A.D., they carried off the bronze image of the God Shiva which they had stolen from the royal temple along with many precious gems. They also raided Orissa and apart from indulging in vandalism appropriated images of Bhairav, Bhairavi and Kali.

The reason is succinctly put by Richard Eaton, "in order to sever the links between a defeated king and the visible manifestation of his divine patron, it was necessary to carry off images or in other ways desecrate his royal temples."[37] This point is hugely important as the Sangh Parivar target Muslim rulers as causing destruction by reason of iconoclasm, not out of mundane political considerations.

The Vishwa Hindu Parishad (VHP) argue that around 160,000 temples were destroyed by the Muslim invaders on no evidence whatsoever. In this context, Richard Eaton has only documented 80 instances of temples being destroyed by Muslim conquerors in 800 years, a far cry from the 160,000 alleged demolitions.[38] There is another issue which many Hindutva thinkers elide over, is the motive, as their underlying assumption is that these temples were destroyed as a consequence of iconoclasm, without any basis. In my view, if one is seeking to link what the Muslim conquerors are alleged to have done with the contemporary Muslim community, the only connection is the religion.

The momentum of politics forces ideological parties to thrive and exaggerate victimhood to continue to burnish and vivify such alleged wrongs. This is the unfortunate consequence of grievance politics; it has no interest in closure or healing. Post the demolition of the Babri Masjid, the UPA government passed the legislation known as the Places of Worship Act, which was to freeze the status of places of worship as of 15 August 1947. Five judges of the Constitutional Bench of the Supreme Court gave the imprimatur of approval on this legislation[39] as it was meant to prevent the recurrence of disputes over places of worship such as the Ram Janmabhoomi movement. Notwithstanding the approval of this law by the Supreme Court, fresh challenges have been launched against the Constitutionality of this legislation involving the Gyanvapi Mosque at Varanasi and the Mathura Masjid. There is one Ashwini Upadhyay who is aiming at

recovering around 900 lost temples, all presumably now housing medieval mosques which require demolition. That is the agenda for the New India.

Irrespective of this statute, there are limitations. Much of the Muslim heritage is actually governed by a separate law, the Ancient Monuments and Archaeological Sites & Remains Act 1958, as the Archaeological Survey of India (ASI) is given the power to protect and maintain these properties. For example, the Taj Mahal would be covered under this statute as it is a dead historical monument, in that there is no active worship. However, the combination of politicisation and criminal underfunding of the ASI[40] is leading to a situation of neglect and, in the case of Muslim monuments, complete disregard. The glorious Mubarak Manzil of Agra was substantially demolished by a builder without the ASI intervening until it was too late.

I believe that the test of authenticity for the care of cultural heritage and patrimony is what are the priorities in relation to renovation and maintenance. Cultures are living and organic and there are existing exquisite temples which have fallen into complete disrepair. In Varanasi, the constituency of the Prime Minister, there are about 2,000 temples in dire need of repair. There is hardly any serious attempt to address these issues in contemporary India unless there is a political angle to exploit.

# PART III

# SECULARISM

# 8

# THE INDIAN VERSION OF SECULARISM

Secularism has been a term which has been much misunderstood. It suits the interests of a particular constituency for this term to be as vague and stigmatised as possible, as it is often associated with Nehru, minority appeasement and Western thinking.

There are many definitions of secularism but one which I find very compelling is that of Romila Thapar and that is "Secularism involves questioning the control that religious organisations have over social institutions. It does not deny the presence of religion in society but demarcates the social institutions over which religion can or cannot exercise control. This distinction is important".[1]

Indian secularism is, however, '*sui generis*'. Despite the best efforts of liberals such as Dr. Ambedkar and K.T. Shah, there was never a clear demarcation between the public and private spaces as exists in most States that call themselves secular. The Mahatma, who no one could accuse of being irreligious, conceived Indian secularism as being one that treats all religions on an equal footing. However, India doesn't make any pretence of treating all religions equally; as explained earlier, Hinduism and Hindu sentiments have always been privileged from the very beginning in public policy, laws and seminal Supreme Court judgements. These facts are undeniable but the Hindu Right needs to manufacture a sense of grievance that a

wrong has been done to them by way of secularism. Much is made of Indian secularism changing after 2014, but the term secularism was compromised from the very beginning. The only difference since 2014, the State has taken on the characteristics of an ethnocracy. This has implications for public policy and ultimately renders the term secularism vacuous and a charade.

One of the factors which has had a malign influence on the debate about secularism is the view espoused by many Congressmen from the 1960s, and one which seems to have much currency today, that the best guarantee for secularism was what Sumantra Bose described as a "romanticised notion of Hindu tolerance."[2] This can be seen in the 1999 resolution of the Congress party in which it asserted what appears to be an eternal verity "that Hinduism is the most effective guarantor of secularism in India."[3] This is a somewhat problematical notion, as religions cannot be stereotyped in such a manner. As Bose concludes "all religions have both tolerant and intolerant characteristics, and that all religions can assume either a tolerant or intolerant form depending on context and circumstance."[4] An example of this would be Buddhism, it is widely perceived as being a peaceful religion, yet in the last few decades the most violent and brutal cases of ethnic cleansing and expulsions in South Asia have been associated with confessionally Buddhist States like Sri Lanka and Myanmar.

The sequitur of this discussion would be whether one needs a secular state at all, as the assumption is that given Hinduism's extraordinary tolerance, minorities will always be secure. However, as one examines the nature of the Indian State, the idea of universalism and tolerance appears to be a chimera and many religious freedoms which are taken for granted in democracies are either lost or are being trespassed upon by the Indian State. In any event, it is important to note that tolerance cannot be equated with policies which foster diversity, equality, co-existence, and multi-culturalism which most modern states with ethnic or cultural minorities enforce, it is an outmoded conceit. As Marc David Baer put it,

> To tolerate means to suffer, endure, or put up with something objectionable. The tolerating party considers its own religion

> to be true and the tolerated groups' religious claims to be false. John Locke famously refused to include Catholics in his conception of tolerance. Tolerance is in fact the expression of a power relationship.[5]

This notion of tolerance being the panacea to navigate the complexities of the Indian State post-independence is seriously deficient in failing to address seminal cultural and economic diversities.

While these observations may disturb many who saw 2014 as being a seismic shift in public policy, it is the burden of my argument to show that this is exaggerated. From the very beginning, the Hindu Right and by that I mean persons who seek to privilege what they conceive as religious practices at the cost of minorities and the public welfare, have had a disproportionate say in public policy. If the Mahatma's understanding of secularism is the equal treatment of all religions was a non-starter, what was the basic understanding of secularism which informed much of the discourse and public policy in the early years of independence? Secularism was sold as a homogenising force consistent with nationalism and one which was profoundly antithetic to any notions of pluralism.[6]The only exception relates to the caste system, where affirmative action programmes for the Dalits and Scheduled Castes were crafted.

Secularism has been used as a device to deny minorities cultural rights as well as affirmative action programmes on the ground that religion cannot be privileged, under Article 15 of the Constitution; but such considerations do not apply to Hindu society, where reservations for Other Backward Classes (OBCs) have turbo-charged the political discourse on the plea of addressing backwardness, policies which now extend to upper castes.

A recent example is the attitude of the UP Government in relation to the Madrassa Act of 2004 which basically sought to streamline education, but was quashed by the Allahabad High Court. The matter came up before the Supreme Court and the Supreme Court stayed the Allahabad High Court Order which was based on the Act being unconstitutional and violative of the principles of secularism. It further objected to the Madrassas being managed by the Minority Welfare Department rather than the Education Department. The

UP Government was supportive of the Allahabad High Court Order and elected not to oppose it. The Supreme Court stated prima facie that the High Court had misconstrued the provisions of the Act as it does not provide for religious instructions and the purpose of the statute was regulatory. This would have affected some 17,000 students and a system of education that had existed for 120 years. Abhishek Singhvi argued that Maths, Science, Hindi and English are taught in the Madrassas and by example referred to as the Gurukuls for Hindus in Haridwar and Rishikesh which are not being targeted by anyone. In some ways it is outrageous that the UP Government of all governments seeks cynically to uphold secularism by denying education to poor Muslims.[7]

### *The Role of Religion in Public Life*

The promise of secularisation articulated by M.S. Srinivasan "implies that what was previously regarded as religious is ceasing to be such, and it also implies a process of differentiation which results in various aspects of society, economic, political, legal and moral being increasingly discrete in relation to each other."[8] This seems to be a mirage; secularism is in tatters and what is apparent is that obscurantism is on the rise challenging modernity. Nehru strongly believed in the centrality of rationalism and the scientific temper. Whilst there is much in post-modernist thinking to harbour doubts as to the unqualified efficacy of Western science and medicine and a belief that we ignore our own traditions, even those traditions would have to be proved by recourse to established methods of reasoning and evidence. What is sought to be introduced by the Hindu Right is blind faith. As a consequence of this, there is a prejudice against modern science and learning which is evident in certain policies.

It is important to point out that absent any Hindu religious injunction against the evolutionary sciences, as exists amongst American evangelicals for example, the Indian Government has in the NCERT curriculum deleted evolution from Class X's science textbooks. As Nitin Pai points out,

> Charles Darwin has not been totally expunged from the Central Board of Secondary Education (CBSE) curriculum. Even so, given that only a small fraction of CBSE students take biology in Class XII, the vast majority of CBSE students will leave school without being taught one of the most important principles of science. Understanding natural selection is important for everyone, not just biology students-for everything; learning how to deal with pandemics, take care of one's health, improve agricultural productivity and care for our environment.[9]

In a recent pronouncement by a panel of scientist citizens, they alleged that India is facing "a systematic threat to its scientific and educational foundation", on the grounds of the institutional promotion of pseudo-science, declining funds and changes in school curricula.[10]

Often when discussing how Indians view religion and tolerance, culinary metaphors have traction. We are to believe that there are two paradigms, one being the *thali* paradigm (where there are many small dishes or *katoris*, each separate and discrete on a common *thali* or platter like different communities residing in a segregated space). Pratap Bhanu Mehta states that "whilst India is committed to an ideology of toleration and practices what elsewhere I have called Segregated Tolerance: each community has its place, so long as each stay in its place. The drawings of boundaries are quite sharp."[11]

According to a PEW research survey, the lightning rod which animates the most controversy and discord is that of inter-religious marriages. Oddly, it unites both Hindus and Muslims with about the same percentage, 70% viewing such marriages with disfavour. It is obviously this unease which propels the '*love jihad*' narrative as, in the case of Hindus, it also feeds into the ludicrous paranoia that Muslims will overtake Hindus in population, a statistical impossibility.

These attitudes lead to physical segregation. This desire for physical segregation between religions is evident in the Gujarat Model, cities like Ahmedabad which were never cosmopolitan have now transformed from claustrophobically parochial cities into segregated ones. This segregation is obliquely enforced by law. Aakar Patel points out that successive BJP governments impose legislations

called the 'Disturbed Areas Act' which is an instrument to monitor and control property purchases in areas which might "affect the balance in the Majority Hindu/Minority Muslim strength."[12] This legislation has serious ramifications on minority communities seeking to buy into a predominantly Hindu areas.

The danger is that for many minorities in urban India, segregation, in practical terms, means ghettoisation. It also means that in the distribution of public goods, governments who are so inclined can discriminate with ease, denying benefits to certain areas which are seen to be minority areas and who, in all likelihood, may not vote for the ruling party.

We have seen graphic evidence of this in Ahmedabad's Juhapura, a slum which houses over 50% of Ahmedabad's Muslims, around 500,000 people. It has grown exponentially since the 2002 riots as many middle-class Muslims have gravitated there for safety considerations. There is an acute deficiency of 'public infrastructure' which has, in small part, been mitigated by the active involvement of certain Muslim NGOs. This development has come with worrying consequences as these foundations are sponsored by the Deoband Movement, conservative and anti-Western in its ideology but perforce enveloping the education space where local schools merge seamlessly with Madrassas "instilling conservative and intolerant values into the students"[13] in the words of Christophe Jaffrelot. Many on the Hindu Right have difficulties with the spreading of this kind of ideology in Kabul but seem indifferent to it in Ahmedabad. These kinds of policies drive the minority community towards ghettoisation and fundamentalism but any action which seeks to mitigate these outcomes would be labelled 'minority appeasement'.

### *Secularism and Its Discontents*

In this analysis of secularism, I wish to address the main objections raised by those who assert that the secularism that was sponsored and promised by the Constitution has either failed or is inherently unworkable. These objections are well summarised by Dr. Rajeev Bhargava, who identifies three separate objections against 'Constitutional secularism'.[14] The first is that it is an imported and

foreign concept; it has nothing to do with India and, infringes upon traditions of co-existence and harmony between the communities which were pre-modern. Secondly, and this argument in part derives from the first objection, is that it is somehow irreligious or anti-religion, part of a desire to banish religious belief from the public space and create a Western secular or a Godless society, the paradigm for deracinated thinkers and atheists.

The third and most popular objection to secularism is that even if one assumes that secularism implies equal respect for all religious practices and beliefs, there is an inherent bias towards minorities, because of electoral politics, at the cost of the majority and this is termed as anti-Hindu. In this context, the persistence of Muslim Personal Law is often alluded to. Bhargava puts this objection very well: "Hindu people are saddled with an anti-Hindu state."[15] This discontent was projected famously by the BJP politician L.K. Advani who termed the Congress secularism as "pseudo-secularism which was founded on appeasement of minorities."[16] In the words of Asghar Ali Engineer "he came out with a strange theory that the Hindus have been 'besieged' in their own country due to the politics of appeasement pursued by the Congress."[17] I wish to examine all three of these objections in greater detail.

### *The Foreignness of Secularism*

Andre Malraux, the great French novelist and thinker asked Nehru in his autumn years, what had been his most 'difficult task'? Nehru responded that it has been "creating a secular state in a religious country."[18] His admission was not a rejection of faith, but the desire to place reason and the scientific temper at the centre of the State's ideology and thinking.[19]

But the subtext of his answer is the plain acknowledgement that India is a religious country and has not ceased to be so regardless of whatever the Constitution provided. The fashionable notion that Nehru was irreligious, perhaps even an atheist, forms part of the charge sheet against him by the current dispensation. Such people ignore the fact that the author of *Hindutva,* V.D. Savarkar, was also an atheist, but that did not preclude him from becoming the head of the

Hindu Mahasabha. As Richard Nixon put it, "A man's religion is of no concern in politics provided he has a religion."[20]

In the original draft of the Constitution, there is no reference to secularism. K.T. Shah, a member of the Constituent Assembly, sought to insert it in the Preamble, without success. The word was only inserted several decades later by Indira Gandhi in 1976, as part of the controversial 42nd Amendment of the Constitution. The unsuccessful attempt by K.T. Shah was in fact opposed by both Nehru and Dr. Ambedkar and for good reason. Whilst both subscribed to the principles of secularism, they were aware that secularism in the European sense—the separation between Church and State—could not be applied in the Indian context. India had to chart its own form of secularism, one that would have a specific Indian meaning. Professor Sanjay Subramanyam detaches the European understanding of secularism from our own observing that "in reality, the term has a political weight in India it never had in the West, and it has acquired a deep meaning and significance in India that many Europeans do not understand. Thus, secularism has become almost Indian a word as 'preponed' or 'denting' (removing a dent in the car)."[21]

There are countless references to the term 'secular' in the Constituent Assembly. It is apparent that apart from the few members such as Dr. Ambedkar and Rajkumari Amrit Kaur who were concerned about the discriminatory nature of many religious practices, for many members of the Constituent Assembly, as Shefali Jha puts it, "Secularism meant a more expansive role for religion." [22] She refers to the speeches of K.M. Munshi, who is often identified with the politics of Sardar Patel who stated that in Indian secularism "the state could not possibly have a state religion, nor could a rigid line be drawn between the religion and church like in the US."[23] This is an argument that favours the Hindu Right, as it would give impetus to those who sought to enlarge the role of religion in public life. Dr. Ambedkar recognised this when he stated, "What should be the policy of the State, how the society should be organised in its social and economic side and matters which must be decided by people according to the time and circumstances." He wisely saw a potential collision that this rigid notion of secularism would have with the impetus of democracy.

This argument may come as a surprise to many who are fixated on the notion that secularism is essentially something foreign and imposed, and in any case, so compromised for the sake of electoral politics as to be irrelevant to the needs of contemporary India. It is to be noted that secularism's meaning has been deliberately perverted to mean irreligious and one which is applied inequitably, as the minorities are portrayed as being privileged over the majority.

Gandhi also subscribed to the notion of universalism and was deeply averse to the idea of state support for religion as he conceived it as entirely spiritual in character. He raised the question "What conflict of interest can there be between Hindus and Muslims in the matter of revenue, sanitation, police, justice, or the use of public conveniences? The difference can only be in religious usage and observances with which a secular state has no concern."[24]

Secularism was considered fashionable amongst many in the heady early years of the Republic when it was regarded as integral to nationalism; an instrument to obliterate what were seen as sources of disunity, tribalism, language and other aspects of what we now recognise as pluralism, but previously was referred to as colonial secularism. The confusion residing in the common perception that secularism was to be contrasted with communalism. It was for these reasons that national unity and integration were seen as pivotal to 'nation building', group rights other than those groups who were considered backward, such as the Scheduled Castes and Tribes, were disregarded with great alacrity and this was the consensus on this across the political spectrum. This insouciance had particular application to religious minorities, particularly their cultural rights as will be seen in relation to the Muslims. The malefic shadow of Pakistan loomed over this discourse.

The existential struggle between Hindutva and modernity is something I will come to, but the objection is clearly anti-modernist. The same objection should then apply with equal force to nationalism, which is also a nineteenth-century European construct, as is the very notion of culture as pointed out by Kwame Anthony Appiah.[25]

*The Irreligiosity of Secularism*

I believe that contrary to the supposition that Constitutional secularism was seeking to banish religion from the mainstream of society and political discourse, it actually privileges religious thinking, practices, customs and culture to an extent not even found in some theocracies. The reason for this is that much of the legislation and judgements dealing with the funding of pilgrimages, temples and shrines from public funds, prohibition on cow slaughter, prevention of conversions, allowing religious symbolism as a means of garnering votes in a democratic election, have been passed or pronounced post-independence. Almost all these laws and judgements favour the majority community and there is hardly any criticism of this, except from the hard secularists, who are a dwindling tribe.

Culture covers much more than religion and it is not static, it is dynamic and pervasive. As the journalist Aakar Patel remarks, "The concept of Hindu Rashtra was not a mere bundle of political and economic rights. It was essentially cultural and not political or legal. It revealed itself through the urge for the realisation of God: a 'living' god and not an idol or immaterial form."[26] He is referring to the ideology of M.S. Golwalkar, the second head of the RSS and this is a point that is critical to the discourse as it is manifest that neither legislatures nor the courts appear to be restrained by Constitutional secularism.

When a discussion of Hindu culture is undertaken, the aspect which exercises a prodigious centrality to the discourse is the practice of pilgrimage to various shrines on festive occasions. The historian Radha Kumud Mukherjee has argued that this practice forms the very core of the geographical unity of India as, according to him, it cultivates the love of the motherland.[27] Today, religious tourism is the pre-eminent tourism in India and the governments play a critical role in encouraging this by the development of roads to important temples, rest houses and grants for pilgrims, at the state level. There are few States in the world, which claim to be secular, but also provide such generous financial assistance to people to undertake religious pilgrimages. India is one of them, and the range and extent of financial assistance has expanded exponentially, particularly in

BJP-run states. That the Maha Kumbh Mela 2025 had been allocated INR 2,500 crores by the UP Government, is an example of this.

The context for discussion of pilgrimages is the appalling tragedy of the second wave of the Covid-19 pandemic and the obtuse insistence of the state government in Uttarakhand to celebrate the Kumbh Mela in the midst of the pandemic, the greatest public health catastrophe that India has witnessed since 1918. There is historical background to the spread of infections and the Kumbh Melas, which have been particularly noted by colonial administrators in the nineteenth century. As Chinmay Tumbe states, "Simply put, Puri and many other pilgrimage sites were perceived by Europeans in the nineteenth century in the same way many see Chinese wet markets of meat in 2020, that is, as places that generate pandemics…"[28]

If one were to demonstrate indubitably that when Hindu cultural traditions conflict with modernity and science, it is the tradition that triumphs, as was the case of the Kumbh Mela in 2021. In that case, the gathering involved around 9 million pilgrims at Haridwar over a period of six weeks, participating in various *Shahi Snan* (royal immersions in the Ganges), which took place on 1 April 2021. Many of the pilgrims travelled from various states which they returned to after the pilgrimage. Barkha Dutt describes the effects as carnage, people falling dead in villages from a mysterious fever, many of these victims having no access to any health infrastructure.

It is not as if the state government of Uttarakhand was unmindful of the risks posed by holding the Kumbh Mela at this time. A Chief Minister of Uttarakhand who opposed the holding of the Kumbh Mela was sacked by the Union Government and replaced by a more pliant Chief Minister, Tirath Singh Rawat, who was in favour of holding the festival in all its glory "and that with Goddess Ganga's blessings, faith will triumph over disease".[29] He expressed the view, that the waters of the Ganges are holy and would kill any virus.

It must be further understood that to host over 9 million people involves great logistical planning as well as funding; the Government had set aside INR 35 crores and had retained 25 trains to bring the pilgrims to Haridwar, a privilege that millions of migrant labourers fleeing cities by reason of the abrupt lockdown in March 2020 were denied. It was only after the figures of infections and deaths began to

spiral out of control and India was in the international spotlight, that the Prime Minister suggested to the head of '*Akharas*' (the priestly groups) that the last ceremony taking place in the middle of May should only be symbolic.

The extent of the spread of the virus through the holding of the Kumbh Mela will never be known. Thousands of people could have contracted Covid and spread it throughout India, thus accelerating the impact and footprint of the second wave in rural areas and small towns. *The New York Times* had estimated the number of deaths ranging between 1.6 million to 4 million, which was at sharp variance to the Government figures. This massive death toll has gained validation by credible bodies such as the WHO[30] in particular, which has excoriated the modest Government figures of 50,000 deaths, the obscene *denouement* of this decision.

The decision to hold the Kumbh Mela more, even, than the election rallies, stands out for the fusion and triumph of 'Hindu culture' and the quest for political hegemony in the cow belt. The real issue is not how the government upholds the right of a person practising his or her religion, but the extent to which such a practice should be upheld when it conflicts with other people's fundamental rights. That the government encouraged the Kumbh Mela to be held in the midst of a pandemic infringes on the very right to life of Hindus and Muslims alike.

The transformation of religion in the twentieth century has to be taken into account, we have seen how many of the small localised traditions of religious worship and practice have slowly been subsumed within the larger notion of Hindutva. This leads to public displays of religiosity which has its uses as Hilal Ahmed reminds us, "that the crucial distinction between religion as a spiritual-moral force and religion as an expression of identity is gradually disappearing. Religions are primarily observed as competing ideologies."[31] This coupled with Hindutva-driven nationalism leads to all manner of public displays of religiosity supported by the State and recently, in the celebration of the Kanwar Yatra designed to antagonise and punish the minority community by insisting that all eateries enroute display the names of the owners so that the pilgrims do not by mistake eat at a restaurant owned by a Muslim.

With religions becoming consolidated, it gives rise to Godmen who have a Pan India reach and the chemistry with politics and politicians becomes positively toxic. The role religious leaders play in validating and endorsing political figures has acquired a disturbing prominence in current times. The Godman has metamorphosed into a businessman, like the US televangelists who have political patronage and endorse political parties. One example of this is the case of Gurmeet Ram Rahim who attracted low caste Dalit Sikhs to his fold, under his group '*Dera Sacha Sauda*'. He was instrumental in assisting the BJP to overthrow the Congress in Haryana in successive elections, the State even giving him timely paroles from prison. This Godman and his *Dera* have been the hotbed of a number of criminal activities, including rape, with over 400 cases of alleged castration and murder.

But the most striking example of religious branding collapsing into stellar financial branding is the case of Patanjali, a company which deals in a variety of Ayurvedic cures, oils, cosmetics and foodstuffs, under leading Godman and yoga teacher, Baba Ramdev. His company appears to be fully backed by the political establishment involving themselves very overtly by securing lines of credit from the public sector banks for the acquisition of a company known as Ruchi Soya, for a pittance, amongst myriad benefits.

### *Secularism Is Compromised Because of Vote Bank Politics*

That a secular state did not involve an anti-religious outlook was clear from the discussions in the Constituent Assembly. K.M. Munshi drew a contradiction between a secular state and a theocratic or religious state. Given the formation of Pakistan, this was a convenient parallel, that "citizenship is irrespective of religious belief, that every citizen to whatever religion he belongs is equal before the law…has equal civil rights and equal opportunity to derive benefits from the state."[32] All this is unobjectionable as it merely provides procedural equality. Rochana Bajpai points out that the stipulation of the State's neutrality in matters relating to religion, a point taken up by K.T. Shah in the Constituent Assembly as necessary to give substantive character to secularism did not carry much favour.

The matter of minority appeasement is really only directed at Muslims, the largest minority, and has been articulated by a leading RSS intellectual Balraj Madhok, who refers to the Constitution to point out the issues which he alleges discriminate against Hindus.[33] If one were to unpack these issues, they relate to Article 21, 30 and 370 which are alleged by him to be discriminatory. Article 21 relates to Protection of Life and Personal Liberty, it is not understood how this discriminates against Hindus and is in favour of minorities. In relation to Article 30, that relates to the freedom of minorities to establish and administer educational institutions. It is not clear how this discriminates against Hindus, particularly as the minorities concerned such as the Sindhi community are predominantly Hindus, as the definition of a minority is not confined to religion, but extends to linguistic groups. Regarding Article 370, it is now a matter of history after August 2019, but even before that, it was not discriminatory. It aligned with the concept of Asymmetrical Federalism, as non-Muslim states like Uttarakhand and Himachal Pradesh also enjoy special privileges, including restrictions on outsiders purchasing land. Additionally, there is the issue of Muslim Personal Law, which will be addressed later.

Of course, there are other issues, such as relatively minor ones like promises to provide educational institutions, even quotas, tickets and holidays on Muslim religious festivals such as *Eid milad-un-nabi,* the Prophet's birthday which V.P. Singh declared when he was Prime Minister. But it is important to distinguish how this is any different to the vote bank politics practised under the BJP Governments directed towards garnering the OBC vote, making assurances regarding jobs, education, etc. It is not clear that these assurances, even if implemented, which they rarely are, infringe any notion of secularism or equality. They are a commonplace of modern electoral politics and there is nothing sinister in that. In fact, as the Sachar Committee Report[34] made clear, the Muslim community is indubitably backward, by all established criteria, and is discriminated against, so where is the pampering? In fact, in a bizarre reaction to the Report, the RSS argued that the making of this Report itself is an example of Muslim appeasement. This is bizarre, as according to Hilal Ahmad, when he argues that "Muslim appeasement has

found new political life in post-2014 India. The BJP has successfully established the fact that addressing Muslims as Muslims is an act of appeasement."[35] This, of course, assumes that there is no discrimination, and significantly that the Muslim community is one and undifferentiated. Neither of these assumptions are true.

# 9

# SECULARISM AND CASTE

I think that the larger issue with the secular narrative, that the Hindu Right have developed, is one which takes a very selective view of group rights. It must be recalled that in the Constituent Assembly debates, except for the SCs and STs, who it was widely agreed had suffered great historic injustice and continued to be marginalised and the Anglo Indians who were microscopic, there was an insistence on denying group rights to others, and this included not just religious groups but caste groups. The impetus for secularism can be fairly said to eliminate religious groups 'as categories of public policy' but also caste groups. As Marc Galantar put it, "Proponents of such transformation were not always clear whether they meant the disestablishment of social hierarchy or the actual dissolution of caste units. But at the minimum what was referred to was a severe reduction in the salience of caste in all spheres of life."[1]

This point was emphasised in an important Supreme Court judgement in the *Champakam Dorairajan* case[2] in 1951 which struck down reservations on the basis that they seemed to be communal quotas, not devised on the principle of backwardness, but as with colonial secularism, with the intent to maintain a balance of power between different communities.

What is manifest today is that the politics of caste is writ large. Pandit Nehru himself entertained reservations about caste, writing that "a caste ridden society is not properly secular".[3] This is a point which Romila Thapar takes up, arguing that the main problem of secularism is rooted in caste. Secular, in her view, is that which is worldly and distinct from religion as stated earlier. To discuss secularism without discussing caste is to ignore the elephant in the room.

Many previously known communities, whether real or imagined, are seeking an even larger share of a diminishing pie and one increasingly determined by political exigencies and divorced from any sense of economic justice or the principles of diversity embraced by most modern economies, in their quest for societal transformation. For example, most modern economies seek to assist and provide quotas for persons such as women, disabled people and communities subject to discrimination, LGBTQIA+ people and others in a desire to ensure diversity in society. This is not the case in India where economic justice has been substituted for social justice and that, too, is restricted to the majority religion, within the configuration of the caste system.

The logic of the OBC category becomes sorely tested if we take the creamy layer exception into account as pronounced by the Supreme Court in the *Ashoka Thakur* case.[4] In the seminal judgement of Justice Pasayat, he recognises implicitly that the growth of this OBC culture appears to be motivated by the dynamics of political patronage and vote bank politics of the most opportunistic kind. The creamy layer exception which the Court played down is sensible in itself but, undoubtedly, exposes the intellectual speciousness of this argument for reservations on the criterion of caste. As Sujit Chaudhary puts it… "if the creamy layer doctrine makes sense—because it emphasises the link between special treatment and backward status—then one would ask why a caste is used to identify beneficiaries in the first place."[5]

It is a complex subject, particularly for those who have never had exposure to the discrimination and ostracisation associated with caste. As Justice D.Y. Chandrachud famously remarked, those who proclaim the virtue of castelessness are those privileged people who

can afford to do so as their caste privilege has "already translated into social, political and economic capital." This is a valuable corrective to those who deny affirmative action on the grounds of caste. However, what is important is that even accepting this, there must be data regarding the extent of backwardness and deprivation to back any argument for reservations. This point was echoed by the Supreme Court in the *Indra Sawhney* case[6] where it was directed that the backwardness criteria had to be properly evaluated and proved. But this exercise might be embarrassing for politicians who seek votes in the name of caste and that is why it is not being carried out.

So this argument that secularism is compromised because of vote bank politics as practised by 'pseudo-secular' parties is, in my view, a brilliant wheeze to distract attention from a much larger problem which, unfortunately, is making itself evident in all manner of ways; Hindu majoritarianism and its grotesque intrusion on our day to day lives. This impact has the widest reach on people's quotidian existence in terms of what they eat, who they marry, which faith they choose to observe, where they live and what they wear. It is, in a fundamental sense, changing the society we were, to one which is overly regulated and intolerant of any difference; parochial and claustrophobic in the extreme.

### *The Road to Theocracy*

The Hindu Right have always attempted to distinguish their thinking from what they label as a theocracy, saying that Hindutva will not lead to a theocracy such as exists in Pakistan, where religious laws are implemented and Sharia is the foundation of all laws. In practical terms, it is very difficult to distinguish between the two, as they both share an acute antipathy towards religious minorities. For example, in Pakistan the Courts have turned a blind eye to thousands of cases of forced marriages and conversions of underage girls, both Hindus and Christians to Islam. This is not dissimilar to the discriminatory principles that apply to Hindus converting to Christianity or Islam and what is known as *Ghar Wapsi* or homecoming when minorities convert.

Historically, it was the case that India had and continues to have a secular Constitution, but that is being undermined by an aggressive Hindutva.

This brings us to the seminal question that Sudipta Kaviraj posed. How can a secular state succeed in a society that is still deeply religious? This is an issue which keeps recurring particularly in the judicial sphere where now the Hindu Right insists that judges who refer to secularism as a foundational principle in the Constitution are acting against democracy. In this respect, thinkers like T.N. Madan and Ashish Nandy have long argued that the problem is not secularism as an ideal, but to impose such a dream of a small minority on the electorate would necessarily be undemocratic, the majoritarian premise.

10

# SECULARISM, PERSONAL LAWS AND THE UNIFORM CIVIL CODE

The issue of personal laws, laws that relate to marriage, divorce, inheritance, etc., has been politically surcharged by the Hindu Right to show how minorities are privileged. However, it is useful to understand the logic of colonial secularism. In general, the British avoided controversy by restricting the reform of personal laws, as according to Abhinav Chandrachud, it would infringe the principle of privacy. This was a response to what Hindus and Muslims were asserting was not "a right to the free exercise of religion but a right to freedom from interference in family matters."[1]

## *Hindu Law Before the Hindu Marriage Act*

Matters regarding pre-independence Hindu law should be put in perspective. Hindu law was largely based on custom and was a system of byzantine complexity; there were numerous schools such as the '*Mitakshara*' and the '*Dāyabhāga*', as well as the Southern matriarchal schools which had limited territorial application. There were various contradictory texts and the all-pervasive influence of caste and custom being central in applying the law, even overriding textual authorities. It must be remembered that in many of the Hindu

Princely States, Hindu customary law was applied with full vigour; Brahmins were even given dispensation from some criminal acts. Even more complicated was the role the colonial judiciary and the Privy Council played in interpreting the law. As the British preferred to rely on textual authorities rather than customary law, this led to huge controversies which, according to Professor Derret, had the effect of ossifying the law,[2] as in essence it was customary. Manu Pillai described the British recovery of Hindu law being "a muddle, the damage scarring generations."[3]

There was no limit to the wives the Hindu man could have and there was no obvious means for a Hindu woman to seek a divorce as a Hindu marriage was a sacrament, unless she was living in a Presidency city like Bombay or in South India where different customary laws applied. This point was made lucidly by N.C. Chatterjee in debates about the Hindu Marriage Bill. He opposed the Bill and stated that by allowing monogamy and the right to seek a divorce, it violated the very sacrament of marriage by quoting from Manu's *Manava Dharma Shastra* in which Chapter 9 (verse 46) stipulates "that there shall be no dissolution of the marital tie. If you try to desert your wife, if you sell your wife even then the marital tie can never be disrupted."

Dr. Ambedkar had tried and failed to push through a composite Hindu Reform Legislation in 1951, which included giving equal rights to women in coparcenary property which the Hindu Right was unwilling to concede. He was distraught by this setback and this served as a moment of epiphany for him and his politics. He was subject to the most vicious taunts and insults from the Hindu Right causing him to beseech his followers to convert to Buddhism and lamented that his Hindu Code Bill "was killed and died unwept and unsung."[4] Ambedkar's bitterness towards the Congress and what he characterised as Nehru's hypocrisy and betrayal when it came to indulging the Hindu Right in their reactionary attitudes to the rights of the Hindu women has not been afforded the attention it should have. In his speech of resignation as Law Minister on 10 October 1951, he pulled no punches and caustically remarked: "to leave inequality between class and class, between sex and sex, which is the soul of the Hindu society untouched and to go on passing legislation

relating to economic problems is to make a farce of our Constitution and to build a palace on a dung heap."[5]

Pataskar, who opposed Ambedkar's legislation, managed to guide the reforms later in separate legislative packages, but against fierce opposition from the Hindu Right, who were largely Congressmen. The path-breaking dimensions of this legislative effort were, as remarked by Marc Galanter, that it "creates the hitherto unknown capacity to marry and adopt across *varna* lines and, with a few minor exceptions, eliminates all of the distinctions along *varna* lines embodied in the old law."[6] Prior to the passing of the Hindu Marriage Act, Hindu women, with some exceptions, had no right to a divorce, and it was only after the passing of this Act that they were entitled to seek a divorce albeit on limited grounds, there being no divorce by mutual consent at that time. If you include the many members of the Scheduled Castes and Dalits who suffered great disability under the old law such as the fact that, barring those residing in Presidency cities, they could not marry outside their caste; the fulcrum of which was traditional caste discrimination. Even in relation to inheritance as Tanika Sarkar puts it, "In the Dayabhaga system of Hindu law that prevailed in Bengal, women neither inherited their father's land nor had a definite right to the land of their husbands. At most they had usufruct rights on behalf of minor sons if they were widows."[7]

So, for Hindu women, it was a very dire position as they had limited choice in terms of who they could marry. They had no right to secure a divorce and, fundamentally, they had no rights in family property other than their *stridhan* which was what they received at the time of marriage. To give women the vote, yet deny them the most basic of human rights connected with gender equality was something which few societies would countenance.

Nehru is, I think, wrongly blamed for not using the opportunity to roll out a Uniform Civil Code (UCC) in the 1950s. He was primarily focused on the reform of Hindu customary law, as there were urgent issues which have been adumbrated, issues that did not affect Muslims. Muslim women had the right to seek divorce by virtue not only of customary law but the passing of the Dissolution of Muslim Marriages Act of 1939. There were no obvious caste prohibitions in the Sharia as regards marriage. Neither was there an

issue regarding ownership of property as Muslim women could own and dispose off property in their name. A UCC would have been opposed in the Constituent Assembly by both the Hindu Right and the minorities, so no reform would have been possible.

The novelty of the Sharia Act was that it was the first example of national legislation reforming personal law, of legislators making the law rather than through community consensus and set the ground rules for reform of Hindu law which happened in the 1950s. The common principle was to codify the law on statutory principles and discard customs and traditions.

### *Problems with Hindu Law Post-Reform*

Whilst there was great satisfaction with the reform of Hindu Personal Law through the legislative initiatives at the time, the fact is that these laws were passed in the 1950s and the world has moved on since then. Much of the legislation took their initiative from English legislation of that time and earlier, the current situation is looking very frayed given the huge transformation of Indian society since the 1950s. So, there are many problems with Hindu law in its current form which invites reform and, to that extent, the fetish with a UCC is a diversion from this.

Given this notion that marriage is a sacrament, the Hindu Marriage Act, 1955 was a compromise as it incorporated the 'fault principle' if either party were to seek a divorce. This was not dissimilar to English Law at that time where grounds for divorce on a fault basis were adultery, cruelty, desertion, etc., as Christianity held the same view that marriage is a sacrament. It is for this reason that Catholics view divorce with great disfavour. In contrast, this is not the case in Islam where marriage is treated as a contractual relation and divorce is extrajudicial; it could be pronounced by way of *talaq*. It is pertinent to know that by virtue of the Matrimonial Causes Act, 1971, English Law introduced the ground of irretrievable breakdown of marriage. This is far more practical for a modern society, providing that financial arrangements on the dissolution of marriage are equitable.

The introduction of a no-fault divorce is an important and necessary amendment. There have been many strong

recommendations from the 71st Law Commission Report published as far back as 1978 as well as remarks from various High Courts and indeed the Supreme Court[8] that state that once a marriage has irretrievably broken down it should be dissolved.

There is also the problem that a divorce has to be obtained through the Courts, given the break down in the lower judiciary, it takes years and substantial fees to obtain a divorce and that is a systemic problem with the judicial system in India.

*Inheritance: Difference in Principles*

There is also asymmetry on the question of inheritance as a Hindu post the reforms could will away his or her assets, subject to coparcenary laws. Under the Sharia, the principle of forced heirship prevails where the estate is divided amongst the family in certain pre-determined shares. In India, the principle has evolved for Sunni Muslims to only will up to one-third of their property and the balance is distributed under Sharia Law Rules of which the widow would take 25% and the children would inherit the balance, the son having a double share to the daughter. In many Western countries, there have been legislations to adopt forced heirship principles to protect vulnerable family members in certain circumstances. So, once again there is a clear difference in principles in the two systems of law. There is one aspect which deserves consideration and that is the Will and how it has been used in North India to reinforce patriarchy.

The Will is a colonial concept unknown to Hindu customary law and which has the potential of reinforcing patriarchal thinking in so far as it enables a means to vitiate the gender equality stipulated in the Hindu Succession Act. It could be used to deny the female heir everything. Thus, there shouldn't be a visceral dismissal of forced heirship principles as one arising from primitive thinking. In the context of a post-colonial society with gender disparity in many fields, forced heirship may be a useful tool to strengthen female rights, as is apparent in England under the Inheritance and Trustees Powers Act 2014 where the widow is given a substantial financial share before the stipulations of the Will comes into force.

Maria Misra observes "critics pointed out the inequity that Hindus should reform their customary law in accordance to what was modern and rational, while Muslims should be left to carry on their traditional practices."[9] She remarks that this analysis was "uncomfortably true," but whilst much of Hindu customary law had to give way to a modern code, it would not be correct to draw this unflattering binary between the two faiths, privileging one for its modernity and rationality and disparaging the other for being traditional. Admittedly they are different systems, but as a lawyer I am not persuaded that it would be possible to label one as rational and the other irrational merely because it is traditional. It is not obvious to me that a marriage premised on a holy sacrament is more rational than one based on contract.

### *The Wife as a Chattel*

On the aspect of gender discrimination, whilst the Hindu codified law enacted important reforms back in the 1950s, there remains much to be done. First, the view that a wife is a chattel and nothing more is epitomised in the husband's right to demand restitution of conjugal rights under Section 9 of the Hindu Marriage Act. It is accepted that this is a remedy that both husband and wife can take recourse to, but it is invariably the husband who seeks to enforce the remedy as most of the reported cases show this. This particular remedy has been taken from colonial law and is premised on the assumption that one spouse is entitled to the society and comfort of the other. It is particularly anachronistic as this legal remedy was done away with in England in the 1880s.

It is but a small step to an even more disturbing feature of the current law which is the matter of marital rape, as Indian Family Law refuses to recognise such a thing. It is necessary to move to a system which gives greater agency to the woman.

The matter of marital rape is based on the fiction that all sexual intercourse conducted within marriage is consensual. But it is relevant to note that the marital rape exemption has no parallel in other aspects of serious misconduct, such as a husband indulging in sexual molestation, voyeurism and forcible disrobing, he is treated

as any other man would be under the criminal law. These colonial vestiges represent an affront to the principle of individual autonomy as set out in Articles 21 & 14 of the Constitution. This position was reinforced by the landmark judgement of the Supreme Court in *Joseph Shine vs. Union of India*[10] which held the offence of adultery to be unconstitutional as it was premised on the principle that a woman is her husband's property after marriage as she has forfeited her sexual autonomy. However, the Government opposed this, filing an affidavit in that case stating that the continuation of the marriage was a legitimate State interest. The Supreme Court had yet to rule on this matter at the time of writing.

When the UPA II government had brought in a Bill to radically reform the Hindu Marriage Act on demonstrably gender-neutral lines, particularly in connection with the reform of divorce law, it was violently opposed. It sought to bring in irretrievable breakdown as a ground for dissolution of the marriage and enhance the financial rights of the wife in connection with matrimonial property, particularly the family residence which would be divided equally between the couple. This is the principle of community or co-ownership of family assets which has been the norm in Europe and the US. This bill was opposed by the BJP on the grounds that it was anti-Hindu, and it lapsed. This serves as a presentiment of what lies in store for any avowedly secular legislation seeking to detach family law from religious scripture or custom.

### *The Persistence of Hindu Customary Law*

It is often overlooked that Hindu customary law was not completely abolished in 1955. The key area of holding property and inheritance thereof within the Hindu family continued to be governed by the principles of the HUF under the stewardship of the family elder, the *Karta* and the Partition of ancestral properties by metes and bounds. These principles have been grafted onto successive Income Tax Acts. The HUF or the Family Firm was generally governed by the '*Mitakshara*' school which was widespread in Rajputana and UP. Bengal and Assam were governed by the '*Dāyabhāga*' School. In Punjab, the HUF was unknown until after Partition when it

was introduced as an import from the cow belt. According to the '*Mitakshara*' school, the family's ancestral properties and any accretions thereto were required to be held jointly by the father and the sons with the quantification of the distinct shares crystallised in the event of a formal Partition.

Critically, the succession to joint property crystallised at the time of the son's birth rather than at the father's death. The daughters and wives were given a right to maintenance from the HUF and the daughters in addition had their marriage dower or *stridhan* to be given at the time of marriage for the women but were otherwise excluded from a share in coparcenary property. The '*Karta*' was the manager of the property. It is generally understood that with the exception of the alienation of self-acquired property, the personal law emphasised the inalienable nature of the joint family property of which the legal definition was a 'coparcenary unit' and was recognised as an entity under the Income Tax Act. Fortunately, there have been some judicial reforms in the area of the HUF, whereby women post-2006 are given parity with male members of the HUF, a beneficial judicial intervention, something Dr. Ambedkar urged in 1951 and was the reason for his legislation to be scuppered.

This issue was regarded as a critical priority in the 1930s and 1940s and influenced many legislators to keep property and money within the family. To best preserve wealth within the family, the HUF concept was the perfect foil to prevent family wealth from fragmenting. As the Law Minister, Patanskar stated "the joint family system is a peculiar institution of Hindu law not known to other systems of law which are more or less based on individuals that… the trend in the modern world is towards individualism."[11]

This assertion has to be seen in the context of traditional society. Sudhir Kakkar sums it up well when he observes that "more than any other factor then… it is the family and the family obligations that play in the life of an Indian which is the glue that holds Indian society together." He further points out that there is a downside to this, a compelling insight into Indian society that "this focus on the family as the exclusive source of satisfaction of all of ones needs also reflects a continuing lack of faith in almost every other institution of society'. Indeed, a man's worth is 'inextricable from his family's reputation."[12]

The cinematic apogee of this social construct is best seen in Bollywood's *Hum Aapke Hai Kaun* which in the words of Rachel Dwyer was about "the joint family…the hero's jeep even bears the graffiti declaration, 'I love my family'—shows all the life rituals and celebrations from birth through marriage to death."[13] This shows the joint family or HUF being the true unit of society which demands loyalty, sacrifice as well as providing love and support. This is a valuable cultural insight as to the centrality of the HUF and reinforces the position that the Hindu family is economically empowered to hold property in a single collective. Elsewhere, taxation is applied on individual wealth and income and, in a secular fashion, not on the basis of religion, a concept which repudiates the notion of religious neutrality in an area which in most societies falls indubitably within the secular domain. Eleanor Newbigin points out that the "historic relationship between the HUF and the democratic government does little to encourage the Indian legislatives to establish a UCC in place of personal law." She argues that to do so would "disturb the complex networks through which different aspects of Indian economic production operate and intersect."[14]

It must be remembered that the coparcenary system ran against gender equality, a fact which was only corrected in 2006 when a married daughter was given a share in her father's family estate. This anomaly was justified by Pataskar who stated that "to put the daughter on the same footing as a son with respect to the right by birth, right of survivorship and the right to claim Partition at any time, will be to provide for a joint family unknown to the law and unworkable in practice."[15]

When one looks at the role of the HUF one cannot detach it from the rise of Marwari hegemony in business in commerce and the post-independence history of Indian business. This community was active in the funding of the Congress party, so its influence outweighed its numbers. According to Ritu Birla,

> By the 1920s, Marwari commercial and industrial interests protected kinship-based organization not by promoting the validity of an indigenous mercantile law and the model of the

> family firm, but rather by rallying for the joint family as an absolute limit not to be transgressed by the law. Social reform and cultural protectionism, both of which sought persistently to legitimize the Hindu joint family, were central to Marwari strategies for commercial and industrial dominance.[16]

The key to understanding this Marwari hegemony is the role of the HUF as a means of accumulating capital, in as tax-effective ways as possible. It is no coincidence that the Marwari business community were the funders of the Congress party for many years after independence.

This device also buttressed the family grip on businesses, a fact of Indian business life which is problematical. We face the fact that persons of Indian origin are CEOs of international corporations such as Google and Microsoft amongst many, but there are few Indian CEOs of companies in India who are in the same league. As Kanika Datta puts it, "It's not that we lack dynamic, even top-class managers. But organisations with reporting structures that proportionately weigh in favour of the boss's son, daughter, spouse etc.... have a discouraging effect on managerial innovation." [17] Datta provides a plausible answer as to why Indian CEOs thrive abroad, but not in India.

It is also pertinent to note that ever since the HUF had been recognised as a taxpayer in the Income Tax Act 1922, it has been a source of much controversy, principally as it was seen as a tax exemption for the Hindu Mercantile class. In fact, the Justice Wanchoo Committee Report published in 1971 expressly concluded that the HUF was a means of avoiding paying tax.[18] Even a Law Commission Paper announced that "it is high time that it is understood that justifying this institution on the ground of deep-rooted sentiments at the cost of the country's revenues may not be judicious." [19] Without going into the details of how tax is avoided, it suffices to say that this is a huge pecuniary benefit enjoyed by the majority community which is not available to other minorities and it is a discrimination which is hardly commented on.

*Reform of Muslim Customary Law*

Muslim Personal Law or the Sharia has been much misunderstood, partly a consequence of the *Ulema* and self-serving politicians who can be termed the Muslim Right. I must note that to describe them as fundamentalists would do violence to language, as it assumes that what they believe is fundamental to the religion, that it is divine law which cannot be interfered with. This is what the All India Muslim Personal Law Board propagates, but it is controversial. It may be true that there may be Quranic verses which stipulate conduct, reinforced by the sayings of the Prophet (the Hadiths) which may take matters further and finally there are the schools of jurisprudence of which there are four significant ones in Sunni Islam which largely flesh out the law. But these schools were formed centuries after the Prophet's death, and if we are to believe that there is only one law which is inviolable, then why four schools?

What I think is relevant for our discussion is the work of one of the greatest Islamic thinkers, Nasir al-Din al-Tusi, who sets out the temporal nature of Islamic jurisprudence, in which the government is given the duty to bring about a state of affairs in which each person obtains and is content with his/her rights, i.e. a state of justice, that law has to be particularised as to what is needed for the welfare of the people in each time and circumstance. This is contrary to the belief of many, that the Sharia is immutable, is one and is insulated from any government interference. In practice this was never the case, and in the twentieth century we have witnessed many Muslim countries amending the law to sub-serve essentially secular concerns and demands such as gender inequalities. The Tunisian Civil Code is an example of this, it abolished polygamy and introduced gender equality in a Muslim-majority country back in 1957. In any event, much of the Sharia that relates to criminal punishments such as stoning and cutting of hands, is hardly practised and has been abolished in many Islamic jurisdictions. No one talks about many of the laws and rules regarding the keeping of slaves, something that was rampant in the Islamic Middle East and Africa in the 18th and 19th centuries, so this notion of an eternal law written in stone is something which has been conveniently concocted by the Muslim

Right to enforce an unjust patriarchy on their women and should be viewed as such.

It is material to this discussion that Pandit Nehru was alive to the many injustices which Muslim women were subjected to, and in his last years in office attempted to redress the problem and in fact appointed a committee on Muslim Personal Law to review the most controversial aspects of Muslim Law, particularly that if a Muslim woman left her faith, she would be denied a divorce and of course, 'triple talaq'. Unfortunately, according to Pratinav Anil, the then Vice President, Zakir Husain's discomfiture and the pervasive unease expressed by Aligarh luminaries killed off a promising initiative.[20]

However, there are particularly Indian problems which need to be addressed, but suffice to say the situation is not as dire as it was. The reality of the conditions of Muslim women has marginally improved by way of pragmatic judicial intervention and important legislation such as the Protection of Women from Domestic Violence Act of 2005. This legislation vests great power in a woman at the receiving end of domestic violence, even financial rights from her abusive husband.

### *Polygamy*

Polygamy, unfortunately, is another one of those Aunt Sally's which won't go away. The practice of polygamy had a context at the time of the Prophet; with continual warfare, there were many widows and the purpose of allowing a man to take another wife was to provide support to the widow and her children. With the ability to work, many divorced and widowed women are not totally without support. For those who cannot, there should be family support and state help. In fact, a point which is not remarked upon is that an indigent Muslim woman is even entitled to approach the Waqf Board of the state in which she resides for financial assistance. The Waqf Boards being the third largest land owner in India after the Army and Railways are hugely wealthy.

In any event, in India there is an acute gender imbalance; there are more males than females and no reason for polygamy. This has to be seen as a path to de-contextualise many laws and practices which

have no relevance to current circumstances and are discriminatory. But it continues to perplex me as to why polygamy which excites so much Hindu and liberal opprobrium, continues to be treated as something sacred and inviolable by the *ulema* in India when many Muslim societies have done away with this regressive practice.

Whilst it is true that the Indian Muslim husband is legally entitled to have more than one wife, this is rarely exercised in practice. In fact, statistics show that Hindus remain more polygamous than Muslims.[21] There has been talk that through the device of polygamy, the Muslim population would exponentially increase and outnumber the Hindus. This canard is also pushed by the Right-Wing authors[22] who suggest that the population of Muslims increases by reason of polygamy and is growing faster than the Hindus. However, this is not apparent by the most recent statistics of 2022 which show that Hindu and Muslim birth rates indicate a small difference between the number of children on average, with the Muslim birth rate being 2.6 compared to 1.94 for Hindus.[23] India's poor gender ratio is largely a consequence of the traditional Hindu obsession with the son and male heir. So, if polygamy was practised at any serious level, it would have the consequence of depriving other men of being fathers.

On the vexed question of Hindu-Muslim demographics, S.Y. Quraishi[24] demolishes this whole argument as absurd and specious. The key question is whether Muslims have a higher birth rate because of their religion or whether there are other factors at play in what demographers call Total Fertility Rate (TFR). These factors include age of marriage, literacy levels and access to contraception, income levels and lower infant mortality. India has great regional variations in TFR. Religion is not the key factor, as Muslims in Tamil Nadu and Kerala have considerably lower TFRs than Muslims in Bihar and UP. If one were to take these variables into account, the differences between the communities disappear. For this reason, there may be a North-South imbalance, with Kerala having a TFR of 1.56 (below replacement) and Bihar having a TFR of 3.4 (in excess of replacement), but that is because of other factors, not religion. The National Family Health Survey shows that the Muslim birth rate has fallen further to 2.3 during the period of 2019 to 2021, from 2.6 recorded in 2015.[25] The fertility rate among Hindus is currently at

1.94 which is slightly lower but which still makes the presentiment, which the Hindu Right constantly project with fevered paranoia of the Muslims overtaking the Hindus in terms of population, absurd and wildly fantastical.

### *Triple Talaq*

For men if the ability to take more than one wife is considered a great boon, so is the practice of easy divorce with hardly any financial implications. It is true that Sharia as practised allows for a non-judicial divorce. However, the matter of the triple talaq is even in the Sharia highly problematical, as it does not allow the man time for reflection.

The triple talaq issue is undoubtedly controversial as it appears to criminalise Muslim men for pronouncing a divorce in one sitting when the Quranic injunction is to give a period of time between each talaq or pronouncement of divorce. Muslim men were allowed to do so by virtue of the Muslim Personal Law (Shariat) Application Act of 1937, which had provided a legal warrant to this practice, which is fairly unique to India. The Triple Talaq Bill, also known as Muslim Women (Protection of Rights on Marriage) Bill 2019, was passed by the Indian Parliament as law in 2019 to make instant triple talaq a criminal offence. This offence will be recognised as a cognizable offence, which means that a policeman can arrest the accused without a warrant. It is further relevant that the accused is liable to be imprisoned for up to three years together with a fine.

There is no doubt that the practice of triple talaq is not only legally problematical, it is highly unpopular with Muslim women, 92% of whom have expressed disapproval of the verbal triple talaq.[26] Unfortunately, when the practice of triple talaq was challenged by one Shayara Banu in the Supreme Court,[27] the judgement gave little direction save to say that this is a legislative matter and the role of the judiciary is limited, but ruled it as unconstitutional. In this case there was a proxy battle between the All-India Muslim Personal Law Board (AIMPLB) and the Government which was trying to burnish itself by identifying this odious practice and projecting it as a prime example of Muslim backwardness. Unfortunately, the AIMPLB went

for the bait, never missing an opportunity to make the Muslims look at their antediluvian best. The affidavit filed in the proceedings by the AIMPLB asserts that whilst accepting these matters forms part of legislative policy, also alleged that personal laws cannot be challenged as being violative of Part III of the Constitution, and personal laws cannot be re-written by reason of social reform. It also asserts that the Muslim Personal Law is based on Muslim holy scriptures and is not amenable to any reform when it is actually based on statute, the 1937 Sharia Act.

Thus, it came to pass that the AIMPLB scored an own goal and brought the Government to enact the Muslim Women (Protection of Rights on Marriage) Bill 2019, passed by the Indian Parliament as a law in 2019 to make instant triple talaq a criminal offense. Hardly any consideration was paid to the effect on the wife, if the husband, who still has the obligation to support her, is imprisoned and almost guarantees destitution for her and her children if the woman was dependent on her husband as a daily wage earner. For the sake of form, there is a provision that the wife is entitled to claim a subsistence allowance from her husband for herself and dependent children. But given the fact that most Muslims work in casual jobs, this is more of a paper concession. Even more absurd is the very basis of this crime. As Hilal Ahmed puts it, "if the marriage, as a civic contract, cannot be broken by the husband even though he says 'talaq' three times, how could this act be treated as a non-bailable crime strictly in legal terms?"[28] This must be correct because even if the husband pronounces it, three times at one sitting, it is legally void; if that is the case there is no divorce, you can hardly imprison a man for attempting a divorce which never occurred, quite apart from its implications on the wife.

### *Maintenance*

The lightning rod which animates the most liberal opprobrium is the vexed issue of maintenance post-marriage. The *Shah Bano* case[29] in 1985 related to the matter of whether a divorced Muslim lady was entitled to maintenance beyond the period of *iddat* (four months) from the date of the divorce from her lawyer husband.

The Supreme Court in *Mohamad Ahmed Khan vs. Shah Bano Begum*[30] ruled that Section 125 of the Code of Criminal Procedure applied to wives irrespective of their religion, distinguishing the case from the ostensible impediment in Section 127 (3) of the Code which carved out an exception to the application of Section 125, if personal and customary law did not apply. This was hailed as a radical judgement, but upset conservative Muslims.

What provoked the ire of the Muslim conservative clergy and politicians was that the Supreme Court had made various *obiter dicta* about the need for introducing a UCC. It had examined the law to establish that under the Quran, maintenance was required to be paid and *Meher,* the bride price, did not amount to maintenance. This judgement was controversial and various members of the Congress Party advised the then Prime Minister, Rajiv Gandhi, to amend the law by legislation, leading to the enactment of the 'Muslim Women's (Protection of Rights on Divorce) Act 1986' which set at nought the Supreme Court judgement and regrettably hastened the growth of the BJP and its brand of politics. It is relevant to point out that contrary to the mythology around this much denigrated Act, Section 3, held the ex-husband liable for the continued welfare of the wife, and only after the liability could fall on her family and any Waqf Board as a tertiary support system. It was not legislation which was designed to leave the Muslim woman in the lurch, and, furthermore, it prescribed no financial limits on the amount of maintenance payable, unlike Section 125 of the Criminal Procedure Code (CPC), 1973. It is also material that minor children are entitled to claim both under Section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and under Section 125 of the Criminal Procedure Code and this was confirmed in the Supreme Court judgement in *Noor Saba Khatoon vs. Mohd. Quasim* which clearly stated that there is nothing in Section 125, CPC which exempts a Muslim father from his obligation to maintain his children.[31] Fortunately, the women's right to obtain maintenance under Section 125 of the CPC has now been affirmed by the Apex Court in *Mohammed Abdul Samad vs. State of Telangana*[32] in 2024 and thus, the Muslim women, by and large, enjoy the same rights as their Hindu sisters in terms of legal rights to maintenance under Section 125 of the CPC.

*The Uniform Civil Code*

One of the main arguments for the promulgation of a UCC is Article 44 of the Directive Principles, which envisages the enactment of a UCC being seen as an imperative of the Constitution.

Professor Faizan Mustafa has a slightly different perspective on this. He examines the wording of Article 44, which makes it clear that 'the State shall endeavour' in contrast to other directive principles which refer to language of greater seriousness and urgency such as 'strive', 'direct' or to treat it as mandatory. For instance, Article 43 specifically notes that the State "shall endeavour by suitable legislation" and this vital verbiage "by suitable legislation" is absent in Article 44. He concludes that "the duty of the State is greater in other Directive Principles than in Article 44." He notes that uniform is not the same as "common" would mean one and the same in all circumstances, while "uniform" means "the same in similar conditions."[33] Different people may have different laws, but the law within a particular group should be uniform. Such a classification is permissible even under the right to equality under Article 14.

Unfortunately, there is nothing which is evident from the majoritarian narrative which would show that there is any degree of interest to reform family law in such a gender sensitive manner taking recourse to different legal concepts. Certainly, the Uttarakhand UCC does not inspire any hope whatsoever for a gender sensitive approach, in fact, it is highly regressive.

One aspect of the introduction of a UCC which is ignored is that the matter of legislation in relation to personal laws is to be determined by both the Union Government and the State Governments as it is on the Concurrent List. This speaks to the diversity of laws, contrary to the standard mantra of 'One Law, One People'. It is incorrect to assume that the diversity of laws is a function of minority appeasement when it arises from the Constitutional mandate that the power to legislate in relation to personal laws lies both with the Union and the State Entities was the position before the first general election and the intent, according to Faizan Mustafa, was to indubitably entrench such legal diversity. The fact that the state of Uttarakhand has legislated its own UCC only supports this.

It is relevant to note that there does not exist complete uniformity even within Hinduism as is projected. For instance, Goa was annexed by India in 1961 and thus the Hindu Laws of 1955 are not applicable to the Hindus of Goa and Goan Hindu men are entitled to polygamy. Similarly, there is a difference between marriage laws in the North and South. In the North, marriage amongst close relatives, *sapindas*, is prohibited but it is accepted in the South.

Swapan Dasgupta floats the canard that, in his words,

> The Constituent Assembly had recognised that all Indians should be governed by common laws relating to marriage and inheritance. However, at the urgings of the leadership, which dealt that the time was not yet ripe to expose a Muslim community still suffering from the trauma of Partition to such radical change, the issue along with the Gandhian pipedream of prohibition and Nehru's quest for 'a scientific temper'—was listed as one of the Directive Principles of State policy.[34]

This is part of the Hindutva mythology; it is counterfactual and what can charitably be described as an alternative truth. There is no evidence of any such desire other than the views of the sub-committee on fundamental rights led by Minoo Masani who was atypical in his social attitudes and whose demands on the timelines were explicitly rejected by the Constituent Assembly. It is rather ironic that it was Sardar Patel who sabotaged the inclusion of the UCC within the description of a Fundamental Right, leaving it to be a mere Directive Principle, something Dasgupta omits to mention.

To my understanding, the argument for the imposition of a UCC in this climate is not the most sensible project for India to embark on; a greater reform of personal laws which may involve the Government playing a decisive role in this regard would be a more practical approach if we want to detach justice from politics. This view is shared by Marc Galanter who wrote:

> Supposedly a common Civil Law will provide provisions of superior justice and utility and will be more uniform and certain, and finally it will reduce communal divisions and promote emotional integration; the first of these arguments does not

> argue for a civil code any more than a reform of personal law, especially where practice and utility are measured by the feelings of those affected. The real arguments, it seems, are those of national integration and modernisation of the State. There is reason to doubt that enforced conformity would reduce rather than intensify difference and communal antagonism.[35]

This correctly identifies the tensions that may surface with this obsession for uniformity in a nation which otherwise grudgingly tolerates linguistic and cultural plurality. Then why not religious practices providing they do not fall foul of the Constitutional mandate?

One of the most disturbing examples of this new thinking indissolubly linked with the nationalist ethos are the '*love jihad*' laws. These undeniably undermine and compromise the agency of a woman to marry who she pleases. In UP the anti-conversion ordinance of 2020 seeks to control inter-religious marriages. It is relevant to note that the UCC legislation in Uttarakhand does not even address this issue. In fact, this legislation is even more regressive as it seeks to register live-in relations, as Gautam Bhatia says, this amounts to outsourcing "the work of coercion to society." Facilitating social pressure, bullying and intimidation through the registration requirement.[36]

Thus, patriarchy is not the monopoly of one religion and the panacea is not the UCC. Those who urge such a deliverance need to ponder on these issues. A more practical project, the low-hanging fruit, is to simply reform existing legislation, the Sharia Act, the Hindu Marriage Act, and align it with the mandate of gender equality rather than embarking on a project which is egregiously polarising and one likely to be based on regressive principles, going by the Uttarakhand example. For example, it still retains the atavistic restitution of conjugal rights and the coparcenary system of holding property for the Hindus.

I believe it is critical to transcend and explicate the traditional binaries and narratives about the foreignness and unsuitability of constitutional secularism. So much attention is devoted to the existence of personal laws and the inability to promulgate the UCC,

when the condition of Muslim women is only one of the many myriad examples of oppression by custom, patriarchy and revanchist ideas pervasive in Indian society. We do not discuss aspects associated with Hindu women and customs such as child marriages and gender selection, discrimination against female children in the same way that we are concerned about destitute Muslim wives. In relation to the UCC, we do not discuss the Hindu reservations about such legislation, particularly in respect to the future of coparcenary property holdings and '*love jihad*'.

## PART IV

# ASYMMETRICAL FEDERALISM, CITIZENSHIP AND THE INDIAN DIASPORA

11

# ASYMMETRICAL FEDERALISM

What do we mean by the notion of Asymmetrical Federalism? It is generally a type of union in which different constituent States possess different rights; one or more of the sub-states may have more autonomy than the other sub-states although they enjoy the same Constitutional status. It is an acknowledgement of diversity and plurality. In this respect, India is not unique in having asymmetrical arrangements in its federal structure. Germany, Belgium, Canada and Spain are examples of such Federalism. However, from the very beginning there has been controversy as Rekha Saxena has stated "on the question whether asymmetry in federal structuring is a slippery terrain leading to secession or conducive to national unity."[1]

In the early years of the Republic with the backdrop of a bitter and bloody Partition, there was a pervasive desire for nation building and the view towards these special arrangements for certain states were seen as anomalies, temporary arrangements to be endured on the way to nationhood. Contemporary thinking is more sympathetic to the asymmetric narrative seeing it as a means to avoid secession. It is often forgotten that the State which influenced India's Federalism the most, the United Kingdom, is itself an example of Asymmetric Federalism if one were to look at the Scottish and Welsh assemblies and that even Scottish Law is based on Civil Law, not Common Law.

The notion of Asymmetric Federalism is something, which given the nature of the Indian reality was regrettably discarded in favour of a unitary construct to consolidate and homogenise the country, but with a light touch and with the inescapable truth that two-fifths of the country had never been part of the colonial construct to begin with, the 562 Princely States.

Within the colonial state, you had gradations of borders, unlike the European States, with certain areas like in the North East, and, for Pakistan, the tribal areas such as Baluchistan (only integrated in 1955) and other peculiar configurations. So, the idiom then in the high noon of Nehruvianism was the perceived need for ushering in modernity, nation building and the creation of a socially just and equitable society, a desire that could easily collapse into a more sinister project to impose an artificial homogeneity on a culturally and linguistically diverse nation. As Ernest Gellner put it, "Nationalism is the congruence of power and culture"[2] and this raises the issue of whose culture? As culture and power invariably reside together, the prospect of the imposition of a uniform culture and language becomes very feasible. To some extent, the ability to create linguistic states in the early part of independent India was an important device to defuse what was seen as fissiparous tendencies, but even this has been overtaken by issues such as tribal needs and with the formation of Telangana for reasons such as economic discrimination.

One of the first examples of the legal issues which Asymmetric Federalism involved the accession of Sikkim as a State. The admission was done under Article 2 and by way of the 36th Amendment Act, 1975, which retained some of the historical features of the Princely State. These features included the reservation of seats for ethnic and religious sub-groups through Article 371-F. This legislation was impugned in *R.C. Poudyal vs, Union of India*[3] on the grounds that it offended the basic features of the Constitution, which were secularism, democracy and republicanism. The essence of the challenge was that it apparently violated the principle of *'One Man One Vote'*, as the degree of reservation was not proportionate to the reserved communities' population. So, according to Sudhir Krishnaswamy, "the central question in Poudyal was the extent to which parliament's power to admit new States is constrained by

the basic principles of Indian Constitutionalism and the need to maintain parity between states."[4] The Supreme Court accepted that whilst Parliament must adhere to the foundational principles of the Constitution, but that adherence need not involve complete equality among the States, so the matter of weighted electorates was accepted.

This judgement has raised controversy, as one of the leading authorities on Indian Federalism, Louis Tillin has treated it as an outlier as Sikkim like the North-east States is essentially peripheral to the Federal structure. However, as Krishnaswamy rightly observes that the special status of Sikkim in the *Poudyal* case "effectively locates a Constitutional principle of Asymmetric Federalism in its interpretation of Article 2."[5] These are part of the number of instances of situations where Federal Laws may not automatically apply. For example, under Article 371-A, central laws have no automatic application to Nagaland unless they are confirmed by the local legislature. In fact, the State enjoys full autonomy in relation to customary practices and laws in relation to land ownership and resources, as does Manipur (Article 371-C) and Arunachal Pradesh (Article 371-H), the intent being to protect the land and rights of tribals. But the examples in relation to the ownership of property are not just confined to the periphery but to Uttarakhand, Himachal Pradesh and parts of Jharkhand and Chhattisgarh.

There has always been a dissonance between the post-Partition settlement and areas which were distinctive and inhabited by people who were racially and ethnically different from the North Indians. Even at the time of the Constituent Assembly, it was accepted that the people of the North East were to be granted autonomous distinct councils.

In India, the two areas which remained outside of the largely unitary framework were the Princely State of Jammu & Kashmir, or what part of it remained with India and the North East. These areas have been sources of angst in Delhi, witnessing violence and separatism and were seen to be areas to be subdued and integrated to reify the very basis of Indian statehood and nationalism. In the case of Jammu & Kashmir which remains an outlier, being the only Muslim-majority state in India, the stripping of Article 370 which

had guaranteed a measure of autonomy to the state under the terms of accession, was projected as being a stratagem to include the state within India and forestall any talk of joining Pakistan, that could only occur if the Indian state wanted to cede Jammu & Kashmir. This action taken in August 2019 has long been on the agenda of Hindu nationalists, although in reality much of Article 370 had been hollowed out, with many of the laws that applied in India being automatically replicated in the troubled state. The symbolic importance of this act cannot be understated as it is a powerful proclamation of the *puissance* of the unitary state, more so in the way it was done without the pretence of consultation and under a dubious invocation of Article 356.

The legal challenge to the annulment of Article 370, which occurred on 5 August 2019, has been dismissed by a five-Bench judgement which upheld the abrogation of Article 370[6]. In effect, Article 370 had, over the years, been diluted, but there remained the question of whether such abrogation could occur without the consent of the elected assembly. According to the Supreme Court judgement, it can and according to Pratap Bhanu Mehta it was done by way of a Constitutional legerdemain , he makes the point that:

> It was mildly reassuring that the Court held that the modification to Article 367 by Constitutional Order (CO) 272 had the effect of amending Article 370 and was ultra vires [Article 370(1)(d)]. This is an important principle because it prevents the government from introducing a backdoor amendment to an article of the Constitution by amending another article. If an article is to be amended, the amendment has to be specific to it. But given that CO 272 is at the heart of the process, should not the whole exercise be considered to be rendered suspect or malafide?[7]

A very valid question, and one to which there is no plausible answer. Neither is the argument that Article 370 was temporary particularly persuasive when at least nine states under Article 371A-1 are under a Constitutional section which defines them as 'temporary, transitional and special provisions'. There is no explicit expiry date, so what about them?

*Hamin Ast*, a self-proclaimed biography of the controversial Article 370 of the Constitution, presents a critical review of the legal grounds for annulment and is persuasive. Its main problem with the annulment is the identification of the Governor, a blatantly political appointee with the necessary concurrence of the people through the Legislative Assembly. At the time when the annulment took place in August 2019 the State Assembly was in suspended animation and, as the state was under President's rule, the representative of the President was the Governor at that time, Satyapal Malik, a former politician. As the book tersely puts it,

> When the Governor… purportedly acted on behalf of the Jammu & Kashmir Government, he was not acting in a personal capacity but rather as a delegate of the President… this amounted to the President seeking his own concurrence, can such self-concurrence be deemed to satisfy the requirements of law. The short answer is no.[8]

This analysis goes to the root of the matter; you deliberately bypass the people represented by the Legislative Assembly through the device of a pliant Governor, who, in this case, represented the President who has *vide* the Ordinance initiated the whole rotten process.

In an excellent study of Kashmir post the annulment of Article 370 by the journalist Anuradha Bhasin, the author is dismissive of the hoopla attending the annulment and concentrates on the shocking policy of shutting down local protests and media. She says that "the world's largest democracy had fully integrated an entire region by turning it into a vast prison to ensure compliance to the new mantra of absolute silence and supreme subjugation."[9]

We also have the Union Territories which the State of Jammu & Kashmir has been reduced to, albeit one with the Legislative Assembly, whilst Ladakh is one without. The other examples of Union Territories include, inter alia, Chandigarh, Puducherry and, controversially, Delhi. I say controversially as the Union Government has tabled the GNCT (Amendment) Bill which defines the Government in Delhi to mean the Lieutenant Governor. With the brute majority the Government enjoys, it was passed in the Lok Sabha and the Rajya Sabha with ease. The new law vests the

Lieutenant Governor with the powers to override laws passed in the Legislative Assembly and thereby demean elected MLAs. At any rate, the original argument was that the Union Territories were either too small to constitute a state or for reasons of cultural autonomy they could not be merged with adjoining states. However, it has now metamorphosed into a device for imposing centralised rule and to undermine the Federal paradigm.

The perplexing part of this anti-Asymmetric Federalism narrative is that it is not founded on any matter of principle, even at the time of writing when the country is in the feverish grip of the most virulent nationalist sentiments, targeting people who speak of greater autonomy of states as being anti-national, as if a single unitary structure with a homogeneous cultural narrative is the only Constitutional paradigm. This ignores governmental discussions with persons representing the Nagas, for example, who openly speak of having separate flags, coinage, currencies and substantive autonomy, something which would be considered treasonous if discussed in relation to Kashmir.

There is a strong and compelling argument for Asymmetric Federalism which is independent of any security or religious consideration: that people who share a common linguistic and cultural identity may want to preserve that and do not want to be swamped by the rest of India. It is not as if the Union Government has not been unmindful of these considerations in the past. If we look at citizenship laws, a new category of citizenship was introduced vide section 6A of the Citizenship Act in 1985 at the instance of Assam to address the influx of Bangladeshi refugees post-1971, the logic being to protect Assamese culture from being undermined by Bengali migration.

Similarly, whilst the Constitution made extensive provisions for affirmative action in favour of scheduled tribes throughout India, the provisions for scheduled tribes in the North East were different from the rest of India. According to Sanjib Baruah, "the indirect rule regime of the colonial era was given a new lease of life."[10] The Sixth schedule provided for autonomous districts and autonomous regions and the governance of these districts was through elected councils to levy taxes and the establishment of Courts for the

dispensation of justice according to customary law. However, by reason of the Naga insurgency, elections to the hill district councils were never held. When the state of Nagaland was created in 1963, the Government inserted Article 371-A into the Constitution of India which broadly provided the same protection as was the case under the Sixth Schedule. In reality of course, there was a paucity of state institutions to exercise and legitimise this autonomy which meant that the Governor appointed by the Union Government would effectively exercise the power, a tradition which has been happening episodically in Kashmir since independence with New Delhi undermining the democratic process from time to time. In fact, the liberal recourse to the appointment of such Governors is mimetic of colonial rule.

Whatever paper concessions were offered to the communities in the Northeast and in the state of Jammu & Kashmir by way of some attempt at Asymmetrical Federalism is greatly outweighed by the denial of basic human rights which most Indians, until recently, would regard as part of their patrimony. So, AFSPA, an acronym for the Armed Forces Special Powers Act has been liberally applied to these states. This colonial legislation (revived by Nehru in 1958) is highly controversial in that it vests the most sweeping powers to the Government security forces, including the police and military giving them *'carte blanche'* to open fire on civilians on the subjective grounds such as the necessity for the maintenance of public order. These powers further extend to destroying any property which, in their view, may be a place where an attack may be launched, such as any house or dwelling area and persons may be arrested on mere suspicion without the need for a warrant. The recourse against the misuse of AFSPA is negligible and there are no reported cases of any substantive redress.

The conclusion one can draw as to Asymmetrical Federalism is that it is used invariably as a cynical political stratagem for politicians to resort to for purely opportunistic reasons. In states where minorities are either a majority or have a large presence, such as Kashmir, Assam or Manipur, the nationalist discourse, alleged security concerns and jingoism are trumpeted, the concerns and interests of the inhabitants are pointedly ignored and they are

not treated as citizens. The Manipur crisis illustrates the danger of Hindutva partisanship in penalising a Christian minority, the Kukus.

Colonial laws in relation to security are imposed almost on a permanent basis as if Constitutional rights are liable to be suspended at will. It is in these peripheral areas such as Kashmir, Assam and the North Eastern States that the matter of citizenship is the most fraught with controversy arising from their histories. But these are being extended by virtue of government policy aided by the Supreme Court judgement on the abrogation of Article 370. As Pratap Bhanu Mehta pointed out, the abrogation by stealth is a new form of repression "reminiscent of the Reichstag or Chinese Constitutional ideology that sees federalism as an obstacle to a strong state and homogenous culture."[11] If unchecked, he foresees India becoming a Union of Union Territories at the whim of the Centre, a Centre paranoid about division and secession.

To put matters in perspective, it is a vainglorious conceit that India has endured as a single political entity from 1947, something which our political class exult in, unlike Pakistan which has gone through a division. But as Perry Anderson[12] points out that many post-colonial states persist notwithstanding how heterogenous or artificial their borders may have been defined. He gives the example of Africa where other than Sudan and now possibly Libya because of Western intervention, all the other 51 countries continue. Similarly, in Asia, other than the division between Malaysia and Singapore, the same countries persist. So, India is the norm, not the exception.

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# CITIZENSHIP AND THE CITIZENSHIP AMENDMENT ACT

In colonial times, the question of citizenship was inextricably linked to a nation, and as the colonial masters repudiated the idea that India was a nation, citizenship was a chimera. The idea of citizenship in India, then, is a post-colonial concept where the founding principle is *jus soli*—i.e., citizenship by birth—in contradistinction to what is known as *jus sanguinis*, or citizenship through ancestry. These two legal concepts have different origins. *Jus soli* is a common law principle which prevailed in the Anglo-Saxon world. *Jus sanguinis* is based on civil law principles. In view of the fact that India was a multi-ethnic society, *jus soli* made admirable sense. As Niraja Gopal Jayal put it, "India affirmed the possibility of citizenship as a political identity without an anchorage in culture."[1]

Citizenship as a concept is controversial and much contested in academic circles. In established nation-states, the notion of citizenship, according to T.H. Marshall is a constant striving for "status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which status is endowed. There is no universal principle that determines what those rights and duties shall be…"[2] This is a citizenship which is singularly aspirational, contingent on belonging to a community and

thus being so entitled. But increasingly, modernity has been making the matter of acquisition of citizenship invaluable and, invariably, an instrument of exclusion. The controversial amendments to the Citizenship Act in 2019 have incited much disquiet, as they seek to introduce religion as a factor in granting citizenship in certain circumstances.

Given the colonial baggage, the clear principle of '*jus soli*' had to be compromised compelling the new republic to accommodate the interest of around 4 million Indians who had settled in what became the British Commonwealth. After all, the British '*imperium*' allowed migration for work and residence throughout the colonies and many Indian subjects took advantage of these opportunities. So, there were large settlements of Indians in Ceylon (mainly of Tamil plantation workers), Malaya and, of course, Burma which was part of British India until 1935. These countries subscribed to different principles in the granting of citizenship, which invariably resulted in offering Indians an inferior or second-class citizenship. This created a dilemma for Nehru who was cognizant of the problem but took the orthodox view that people who have settled in a country should owe allegiance to that country and there should not, as a matter of principle, be a case of divided loyalties. In this respect, Nehru's views were not very different from Norman Tebbit's famous cricket test, that if you insist on supporting the test team of your country of origin in England, you are being disloyal to England and unpatriotic.

In view of the demands of Indians living overseas, the *jus soli* principle which came to be enshrined in Article 5 of the Constitution, supplemented by domicile and descent-based qualification—not unlike English Law—developed to accommodate the needs of the Indian diaspora who needed the guarantee of the right to take Indian citizenship in the event of a possible abrogation of their rights in the country of domicile. This was not fanciful, as it happened in Uganda in 1974 when the Asian community was displaced and expelled from Uganda under orders from the odious General Idi Amin. The complication has always been with the status of Pakistanis, most of whom would qualify under *jus soli*, but were excluded with the creation of the new State of Pakistan. The controversies which led to the formulaton of Articles 6 and 7 of the Constitution were based

on the great migrations. By setting out the matrix of citizenship, the Indian State was affirming its sovereign powers.

There were many issues arising from these migrations involving the rehabilitation of refugees, addressing the horrendous abduction of women which occurred on a huge scale in Punjab and concerns arising from this led to the Nehru-Liaquat Pact of 1950. The Pact arose out of the violence and abduction of women which had occurred on both sides of the border and attempted to set a time limit which would enable both countries to maintain the religious demographic status quo. In effect, it attempted to repudiate Patel's mischievous policy of encouraging minority migration to create some form of majoritarian spatial regrouping along the lines of the two-nation theory.

There is an inherent complexity in the nature of the colonial borders and the grant of citizenship, particularly if territoriality is the basis of citizenship. So, if you were to cross the border or migrate administratively, there had to be a category. This was particularly evident in the East where many Hindu Bengalis saw Partition as a temporary phase rather like the Partition of 1905 and continued to live in East Bengal. They could not legitimately cross the border so a special administrative category was crafted for them which was termed 'displaced person'. As Anupama Roy states, "The ministries of Home, External Affairs, Rehabilitation, Law and the Election Commission of India acted in concert to make all the necessary arrangements to complete the registrations of displaced persons as Indian citizens."[3]

The Indian government passed the Evacuee Property Legislation, 1951, the intent of which was to provide rehabilitation to the Hindu and Sikh refugees who had migrated from West Pakistan to India and the Bengali refugees who had left East Bengal. The matter of citizenship was then influenced by this factor, as returning Muslims who were seeking to dispose off their properties in India were interrogated to find whether they had been allotted property in Pakistan and, if so, they were classed as evacuees in India. But the bureaucracy went one step further and devised an ingenious category known as 'intending evacuee' for those who had intended to migrate and their property would automatically fall under the Custodian's

authority. Salman Khurshid refers to how this draconian legislation affected joint family properties.[4] As most Muslim families owned properties as co-parceners by reason of Sharia laws of inheritance, it was particularly prejudicial for them. It placed the burden of proof on the Muslims to prove that they were not evacuees or that they harboured no future intention to migrate to Pakistan. Records of the time disclosed many cases of bureaucrats with political patrons acting in an arbitrary or capricious manner in relation to the appropriation of such property.

These laws had a profound impact on the psyche of the Indian Muslims of the North. Mushirul Hasan observed that these laws:

> Were the most inequitable, Muslims could not easily dispose of their property or carry on trade for fear that the long arm of the property law might hold them in its grip. The laws restricted business opportunities and crippled large numbers of Muslims especially in the North and West of India.[5]

In fact, under the creative rubric of 'intending evacuees', a number of Congressmen who sent small amounts of money to relations in Pakistan were categorised as intending evacuees so that their property would be liable to fall under the custodian's aegis, despite no explicit intent to migrate.

### *Assam and Citizenship*

If the problems of the Muslims in UP and their stigmatised and fragile citizenship were a source of fear, this was negligible in comparison to the plight of the Assamese Muslims. These concerns predate Independence. Assam was famed for its tea plantations and for that reason the colonial tea planters sought low-cost labour from all over India, a parallel one could sensibly draw with the Tamil influx into Ceylon in the nineteenth century. This process was further aggravated by land reclamation attempted by the colonial administrators which required plentiful labour drawn principally from East Bengal. Even in colonial times, there was a large population of ethnic non-Assamese people who had been settled in Assam for several generations. Many of these non-ethnic Assamese, a majority of whom were Muslims,

adopted the Assamese language and as much of the culture as they could and were termed 'Miya Muslims'. The issues in Assam cannot be seen in the simple binary of Assamese and non-Assamese as there is a political dimension which has now transcended these issues.

It is apparent that the recent targeting of Miya Muslims who had consciously adopted Assamese as a first language was to serve a larger political agenda. It seeks to galvanise tribes such as the Bodos to agitate against the Miya Muslims on the ground that they are not ethnic Assamese. The pre-meditated expulsion of Muslims from Assam pre-date ULFA; it can be traced to the Nehruvian era. In a new study, Pratinav Anil has shown from official figures that in Nehru's second and third terms, around 35,000 Assamese Muslims were deported or given notice to leave the country. The 'modus operandi' of these expulsions involved, according to him, Muslims being driven out of their homes to makeshift camps at the border where they were forced "to sign papers declaring falsely that they were Pakistanis."[6]

This impetus towards communalisation is now at its apogee with a BJP Government ruling Assam, following a policy which seeks to stigmatise Assamese Muslims with the allegation of being Bangladeshi infiltrators, in many cases without regard to the facts. It is not a coincidence that the size of the Muslim population in Assam, being 34% at the time of writing, magnifies this issue. It is the Indian state with the second largest Muslim population after Jammu & Kashmir, and the Muslims of Assam are in many cases falsely stigmatised as Bangladeshis and thus persons who should be denied citizenship.

However, as Sanjib Baruah says, amidst much of this cacophony of allegations of illegal migration and the perceived perfidy of politicians seeking to enrol illegal migrants on the electoral list, "the fact of Assam's contemporary religious demography is the result of a migration flow that began more than a century ago"[7] is pointedly ignored. The present political class have a vested interest in creating as much confusion as possible over the identity and provenance of these inhabitants, deliberately to avoid facing the incontestable fact that many of these persons have been residents in Assam from colonial times and, that many of the migrants, who have crossed over from Bangladesh, particularly from Sylhet, in recent times,

are actually Hindu Bangladeshis. It is this paradox in the narrative that the Modi Government have sought to address through the Citizenship Amendment Act (CAA) to regularise what has been a policy followed by the Assamese Government for many years; to class Hindu migrants as 'refugees' and Muslim migrants as 'infiltrators' and according to a recent study this would apply to resident Muslims in the State of Assam post-independence.

The Assamese agitation from the late 1970s to the mid-1980s set off a succession of other agitations in the North Eastern states to act in a similar manner to migrants, though the migrations were negligible and with minimal demographic impact. In Arunachal Pradesh, communities such as Chakmas and Hajongs who migrated from what was then East Pakistan in the 1960s along with the Tibetans who fled with the Dalai Lama in 1959 have been targeted as illegal migrants. The Yabins who came from northern Myanmar have also been identified as infiltrators. These communities have lived peacefully in India for several generations and by now a large percentage of them have been born in India and as such would be entitled to qualify for citizenship in many countries that have subscribed to international conventions.[8]

Even more bizarre are entities called 'Chitmahals', enclaves of another country within the territorial borders of another. At present there are some 130 Indian Chitmahals within Bangladesh covering around 21,000 acres and around 95 Bangladeshi Chitmahals within Indian territory. The people living there are practically stateless and have no access to any security.[9]

### *The Citizenship Amendment Act, 2019*

The matter of citizenship came into public prominence with the passing of the Citizenship Amendment Act in 2019 (CAA-2019) and, reified for those who continue to believe that India is a secular republic, that this palpably is not the case. The Act openly discriminates in the grant of citizenship to those who seek it, refugees and migrants, on the grounds of religion. This is manifest from a plain reading of the CAA-2019 (proviso to Section 2(1)(v) reads as follows: "provided that any person belonging to the Hindu/

Sikh/Buddhist/Jain/Parsee/Christian minority from Afghanistan, Bangladesh or Pakistan who entered into India on or before the 31st day of December 2014 and who has been exempted by the Central Government by or under clause (o) of subsection (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act-1946 (FA-1946) or any rule or order made thereunder, shall not be treated as an illegal migrant for the purposes of this Act". The Government has argued that this amendment gives a one-time amnesty to those who fled religious persecution in these three countries and sought refuge in India prior to 31 December 2014, and did not have the necessary documents. It is further relevant to note that the amendment pointedly excludes migration from the Tribal areas of Assam, Meghalaya, Mizoram or Tripura as included in the Sixth Schedule to the Constitution.

It was the CAA-2019 law that provoked massive controversy, leading to major demonstrations in Delhi largely led by Muslim women. At that time, the fear was that this law was to be associated with the National Register of Citizens (NRC) involving the government seeking to establish who are citizens and who are not, a process which depends on the capacity of the stigmatised person to furnish documents and one which would discriminate against the poor and disempowered.

The NRC was made part of the Citizenship Act, 1955 through a 2003 Amendment. The intent was to issue identity cards for all citizens which would form a comprehensive register of all citizens of India. Although not expressly stated, the oblique purpose was to identify illegal migrants, particularly the Bangladeshis as the first laboratory for this potentially gargantuan exercise was Assam, where the matter of illegal migration was an incendiary topic. Writ petitions were filed seeking the Assamese Government to implement the NRC causing the Supreme Court to direct the NRC to be enforced in Assam with the deadline of 2016 with additional Foreigner Tribunals and to act in consultation with the Bangladesh Government to deport those found without documents. Eventually, when the list was published in 2019, the process excluded over 1.9 million people who were constrained to appeal to the Foreigner Tribunals. To the embarrassment of the then BJP Assam Government, the list of

persons unable to prove their citizenship included far more Bengali Hindus than Muslims. It is not surprising that this list was robustly rejected by the Sarna Government as illegitimate as the outcome did not align with their agenda.

Many people were excluded from the list due to being unable to provide the requisite documents. Sanjib Baruah pointed out that the exercise was not entirely dependent on documentation but there was a further discretion vested in local administrators to deem entire settlements and communities as 'original inhabitants'. It is not clear on what basis this discretion was to be exercised, but given the political agenda of the then Assam Government one can reliably guess.

The BJP's spin doctor at large, Mr. Amit Malviya, seeks to make a revisionist narrative to give some intellectual credence to the CAA in which he liberally cites instances of Congress politicians lamenting the plight of Hindu refugees either from Bangladesh or from Pakistan. Indubitably, there has been a steady migration of Hindus from these countries, but that does not necessarily mean that such migrations were necessarily prompted by religious persecution. For many persons who can prove religious persecution, it would be sensible for them to migrate to countries that have refugee laws and asylum procedures than come to India which offers no such safeguards. There is a confusion between migration out of religious persecution and economic migrants in search of better opportunities.

The purpose behind Malviya's revisionism is clearly to burnish the two-nation narrative, a narrative which was firmly and indubitably rejected by the Constituent Assembly. As Gautam Bhatia so trenchantly put it, the CAA discriminates "between people on the basis of the characteristics that they cannot control."[10] The CAA cannot but be seen as a savage assault on Constitutional morality.

If one disregards Malviya's revisionism, the other apologist for this legislation falls into a more exalted category. Harish Salve is one of India's most expensive lawyers and has now been anointed as a King's Counsel in England, the ultimate accolade. His argument is that an attack on the CAA is an oblique attack on the capacity of the State to make classifications. The gist of the argument is that if the law treats equally members of a particular class, it cannot be alleged that

there has been a denial of equal protection on that ground, having no application to persons other than minority communities in three specific countries. It is, according to him, a law based on a rational criterion. That criterion is confined to religious persecution.

But as Salman Khurshid points out, "we will still need to know why religious persecution meets the test and not persecution per se."[11] Even Salve would agree that persecution *per se* is not a good thing but on what basis do we narrow it down to religious persecution? This is not fanciful as the treatment of the Tamilians in Sri Lanka is a pertinent example; there is no doubt that the Tamilian community was and is discriminated against by the majority Sinhalese in Sri Lanka, not on religious grounds, but ethnic ones. If so, why should the Tamilians, who indubitably hailed from India, both Hindu and Muslim, not enjoy the same rights as a Hindu Pakistani who may have migrated? Why is Sri Lanka excluded from the neighbouring countries? It cannot be because it was not part of British India as neither was Afghanistan, yet it is one of the three countries identified under the CAA. Myanmar, where there has been wholesale persecution of Rohingyas on religious grounds, was part of British India until 1935. This distinction which, according to Salve, is based on a rational criterion, does not seem to take account of a community within a religion who are persecuted on religious grounds. To even restrict religious persecution to one religion persecuting another, and to exclude internecine conflict within a religion is frankly perverse and restrictive.

If it is his argument that religious persecution or discrimination cannot take place within a religion, then on what basis are there reservations for Dalits and Scheduled Castes within Hinduism? What about atheists and apostates? What protection do they have, as they also are subject to religious persecution? The very notion of religious persecution adopted in this law is, in my view, selective and perverse.

One detects an Islamophobic strain in the fact that His Majesty's Counsel asks the rhetorical question, "Do we really need proof that minorities are persecuted in these Islamic Republics?" This seems to imply that, because they are Islamic Republics per se, religious persecution is a *sine qua non* of their existence. He then proceeds with seamless logic to inquire, "How can Parliament be faulted for coming

to a conclusion that such minorities in the three named neighbours need to be protected?" So, he has made two faulty assumptions. First, because it is styled an Islamic State that elevates religion as a basis of its laws, this would necessarily involve persecution of minorities. If such was the case, then on an ex-hypothesis basis there should also be restrictions on Hindus or Christians living and working in numerous Islamic states like the United Arab Emirates, where they seem to flock. The United Arab Emirates elevates Sharia as the basis of its Constitution. This has not prevented many Hindus and Christians from India, who are living in Dubai, from applying for the Golden Visa Programme, which grants them the right of residence. Secondly, if the concern is to prevent religious persecution in the neighbourhood, why does the law exclude Sri Lanka and Myanmar? Is it perhaps because they are Buddhist countries and the belief is that Buddhism is a religion of peace and Islam is a religion of war?

What the proponents of the CAA ignore is the fact that whilst historically India has seen a net migration of people from its shores to improve their prospects in foreign countries, in 2022 there is recorded a total number of 225,620 Indians who gave up their citizenship, the highest in the last 12 years. More than 1.66 million having given up their nationality since 2011.[12] In the case of the 2022 figures, this should be more worrying to any government as many of these are persons who are high net worth individuals, purchasing foreign nationalities. So, these are precisely the sort of people who any country would not want to lose, persons of wealth and education.

Is it possible to decontextualise such laws from the political debates, promises in manifestos and speeches that envelope such amendments? To attempt to detach these amendments from the political background is an erroneous conceit, one favoured by the Hindu Right to camouflage that the real purpose of this amendment is to embed issues such as migration and asylum in a religious matrix. It is perhaps a precursor to replicate the Israeli law of return, which would extend citizenship to any Hindu living anywhere in the world irrespective of how tenuous their connection with India is.

When Donald Trump assumed office in 2017, one of his first acts was to restrict migration from Muslim countries through a travel ban. In the course of the arguments in the US Supreme Court, there was much reference to President Trump's overt animus towards Muslims and his main intent being to make their entry into America almost impossible. While the US Supreme Court upheld the travel ban, Justice Sonia Sotomayor gave a powerful dissenting opinion in which she concluded that none of the features of the Proclamation highlighted by the majority supported the government's claim that the Proclamation was genuinely and primarily rooted in a genuine security interest. What the evidence actually shows to the reasonable observer is that the primary purpose and function of the proclamation is to ban Muslims from entering the US. In fact, she roundly states that "no matter how many officials affix their names to it, the Proclamation rests on a rotten foundation."[13]

This courage and outspokenness seem to be lacking in the Indian judiciary, in not only the urgency with which matters of high Constitutional importance are afforded, but also the language to describe such a perversion of the law as blunt and straightforward, when the arguments of the government are demonstrably dishonest and unconstitutional. For example, in the infamous *Sonowal* case[14] in the Indian Supreme Court, when striking down the Illegal Migrants (Determination by Tribunals) Act, 1983, the Supreme Court was pleased to describe migration as not merely an illegal entry into a foreign territory, but "an act of aggression". This remarkable non-sequitur was founded on the prejudice that illegal Muslim migration is associated with religious fundamentalism and as such poses a threat to national security, similar to President Trump's characterisation of illegal migrants as criminals, rapists and drug dealers. Thus according to Anupama Roy, the Court discussed the influx of migrants "not in terms of changes in the linguistic profile of the State but in terms of its religious profile, emphasising the increase in the Muslim population, and the threat it posed not just to Assam but to all of India."[15] It is hypocritical that the Indian Government who condemn this practice, do not show the same indignation at the many thousands of Indians who illegally enter other friendly countries. In the US, Indians comprise the third-largest undocumented immigrant

population, amounting to 725,000 of such migrants, after Mexico and El Salvador,[16] who in Trump's second term are being deported.

At any rate, the CAA has been seriously defanged and the Prime Minister has unceremoniously dumped the controversial National Register of Citizens. This unsatisfactory quagmire should prompt the Government to enact a proper legislation on refugees and the grant of asylum where one can distinguish between migrants who are the victims of persecution, whether it be on religious, ethnic or linguistic grounds from persons who may be economic migrants but are not willing to follow the procedures for obtaining work visas. India has been remiss in that it is only one of the few *soi-disant* liberal democracies that have not signed the UN Refugee Convention of 1951, and, whilst several model laws have been drafted by the National Human Rights Commission, they remain on the shelves gathering dust.

Shashi Tharoor, who has been trying to pilot such legislation through the Lok Sabha, points out how there is complete confusion with laws relating to refugees in India. As he puts it, "We have a cocktail of laws such as the Foreigners Act, 1946, the Registration of Foreigners Act, 1939. The Passports Act (1967), the Extradition Act, 1962, the Citizenship Act, 1955 (Including its controversial 2019 amendment) and the Foreigners Order, 1948—all of which club all foreign individuals together as 'aliens'. Because India has neither subscribed to international conventions on the topic nor set up a domestic legislative framework to deal with refugees, their problems are dealt with in an ad hoc manner, and like other foreigners, they always face the possibility of being deported."[17] This gives rise to arbitrariness and capriciousness which I do believe suits this Government's mindset of minimum governance, maximum harassment.

These issues are particularly pertinent to India in light of the question of Kashmiri Muslims. There are Indian citizens who fled Kashmir during the 1990s because of the army crackdown on militants and many civilians who were viewed as assisting the militants, around 35,000 Kashmiri Muslims fled to Pakistan Occupied Kashmir (PoK) in that period. Pakistan has not given them any citizenship and they are essentially treated as stateless refugees.

This migration has to be looked at in the context of civil strife during that period, and the imposition of AFSPA which denies them due process. Yet the persons who fled for whatever reason continue to be Indian citizens languishing bereft of any rights in PoK. They deserve, at least, a right to be heard.

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# THE INDIAN DIASPORA

An important factor propelling this virulent nationalism is the role of the diaspora, the non-resident Indian or those of Indian origin. One would imagine that people who have voluntarily left a country for whatever reason, may not harbour the desire to be associated with or be supportive of a country they chose to leave or their forefathers did. They would be more interested in integrating in their new home. Oddly though, the diaspora continues to have powerful linkages with India in ways which are not particularly helpful or benign as we will come to later.

It is important to understand the size of the diaspora. According to one figure, the number of migrant workers totals more than 281 million internationally, of which 18 million are of Indian origin.[1] This is a substantial figure by any standards, in fact, it approximates to that of a small European country such as the Netherlands. They remit substantial funds to India, in 2022; this exceeded US $108 billion, around 3% of India's GDP, more than in any other country. The diaspora is a serious contender for attention from the Indian Government demonstrated by the concessions offered in the form of the OCI (Overseas Citizen of India) status, a permanent visa allowing the holder to reside and work in India, bereft of the right to vote.

Yet, the introduction of the OCI card recognises putative citizenship anchored in culture and ethnicity and this aligns with much of the modern trajectory of globalisation, migrations and technology, where the role of the nation-state is demonstrably diminished and recognition is given to de-territorialised citizenship. One reason for this was that India was much entranced by the role the Chinese diaspora played in relation to the growth of the Chinese economy and wanted to emulate this model.

It is, in turn, a nod to the indispensability of the migrants and their indubitable success particularly in the US forming the highest-earning migrant group with a median household income of US$150,000, double the national average. Among their numbers, they include 25 Chief Executives of S&P 500 companies and with that comes political leverage. As *The Economist* put it, "A stunning example of this came in 2005, when America struck an agreement that, in effect, recognised India as a nuclear power, despite its refusal to sign the Nuclear Non-Proliferation Treaty (along with Pakistan and Israel). Lobbying and fundraising by Indian-Americans helped push the deal through Congress".

It has become commonplace that the diaspora plays a seminal role in the emergence of the new nationalism and, paradoxical as it may sound for a people who have left India, they are the most ardent supporters of the Modi government and its nationalist narrative for the reasons of national pride. In a post-colonial world, and one where many host countries are reluctant to change their national or colonial narrative, there is an inherent juxtaposition between the pride the host country has in its past, compelling migrants to concoct or revivify pride in their countries of origin. It can, of course, go either way, many successful migrant families want nothing to do with where they came from, but many do. To some extent this process has been hastened by the speed of modern technology and the growth of social media.

The support for Hindutva from the NRI population has been both vociferous and pervasive, even extending to local political choices which NRIs have to make in countries in which they live.

Many of the NRIs in the US work in the tech industry with little background in liberal arts and invariably import their high-caste

prejudices to the USA; this melds with the Islamophobia that is prevalent in the USA rather well. What is surprising though is that this Islamophobia even extends to Islamic countries such as the UAE and Oman which have traditionally good relations with India and have had no difficulty in allowing the Hindu community to practise their religion freely and prosper hugely. In myriad cases, many Hindu businessmen have thrived in these countries and yet express the most virulent of Islamophobic views. This is perplexing as there is no ostensible provocation for this mindset. It is not as if these highly privileged people are confined to ghettos such as the North African Muslim population are in the '*banlieues*' of France.

These attitudes contrast with the perception in the global south regarding Nehruvian India which was regarded as an exemplar, a paragon and a benchmark for other post-colonial societies to follow.

I say this by way of background as there was undoubtedly a degree of empathy between the middle-class Indian and the larger post-colonial third world which has now diminished. The Indian middle classes now consciously identify with the interests of the US, Europe, Israel and the global Right. This is not just because of economic liberalisation and foreign direct investment as well as the hypnotic allurement of American soft culture, though these are important reasons. I believe that this identification is also regrettably based around a subconscious Islamophobia fuelled by the clash of civilisations thesis propagated by Professor Samuel Huntingdon, placing the West and Islam as irreconcilably opposed to each other. It is also influenced by a vainglorious perception that India is not really a third-world country. It has a vibrant IT sector, a space programme, nuclear arsenal and these make it special and singular, ignoring how the majority of Indians live.

Whilst I would deal with the matter of these perceptions later, Nitin Pai makes a very valid point that this desire to identify with the country of origin can pose risks, he puts it well by saying "Indian leaders should take extra care not to conflate Indian origin with loyalty to India, or to religious or ethnic sectarianism. An important reason Indian immigrants have done well in politics, culture and business overseas is that they have always been—and been seen—as bona fide members of the local political community, with no

divided or extra-territorial loyalties."[2] Unfortunately, politicians at the time of writing, including the Prime Minster revel in NRI diaspora gatherings, and harvest the popularity demonstrated for their political needs at home.

It is an extraordinary paradox and irony that the ideology of Hindutva derives its mojo from its categorisation of Indian minorities on the basis of where their most sacred places of worship are only to use this to stigmatise their citizenship. Yet, it does not seem to occur to many of these NRIs and Hindutva ideologues that encouraging and fostering this loyalty for India as their home country might not create problems for them in their countries of residence and where many of them are citizens.

The NRIs also seem to ignore that, irrespective of their nationality and religion, they cannot escape racism and the toxic ideology of white supremacy that is all too pervasive in the various Western countries in which they have settled. The infamous examples of Sikhs being attacked in America and some being killed post-9/11 after being wrongly identified as Muslims illustrate not just the ignorance of the white supremacists, but the fetish with race. The Russian invasion of Ukraine prompted a huge outpouring of sympathy for the Ukrainians to the point of relaxing all immigration restrictions for these refugees in contrast with their attitude towards Syrian and Afghan refugees, persons who had to flee their country ironically because of botched Western interventions.

It is thus convenient for many NRIs to hold such Islamophobic views and, as a consequence, support a virulent nationalism which seeks to portray an India which they imagine as a potential superpower radically different from what the West normally envisages as a nation which continues to be poor, corrupt and weak, particularly in relation to its immediate neighbour, China.

As Nivedita Menon points out, "Hindutva is now a global phenomenon, and one of the key projects of Hindutva in the global North is to present Hindutva as coterminous with Hinduism". As such, it enables Hindutva organisations to claim that any critique of Brahminism, caste discrimination, or patriarchy as Hinduphobia. In this, she observes there is a co-victimhood with antisemitism.[3] Criticism of the religion and the State overlap seamlessly.

# PART V

# THE ROLE OF THE JUDICIARY AND MAJORITARIANISM

14

# THE HISTORIC ROLE OF THE JUDICIARY POST-INDEPENDENCE

Bruce Ackerman stated that the "Partition and the creation of Pakistan profoundly shaped India's power to revolutionary Constitutionalism… Partition reduced India's Muslim population to 11%, allowing Congress to dominate the proceedings. The Assembly made a number of significant concessions to Muslims and other minority groups, but there was no longer any question that the Indian National Congress was calling the shots. India, in short, serves as a paradigm case involving the Constitution of a new regime hegemonic party movement."[1] What is ignored is that this hegemony was not just a consequence of the Congress being the party that surcharged Independence, but substantively changed the geographical configuration of India post-Partition, giving prominence to UP and much of what we call the cow belt, its vote bank. India had, after the first election, metamorphosed into a one-party state, which, perhaps, was the intent behind the Partition.

This hegemony of the Congress was further entrenched by the process of Constitution-making. As it was a nationalist party, it had a compelling interest in forging a strong unitary Centre whilst professing pieties about Federalism. However, Dr. Ambedkar was brutally honest about the basis for the Union as distinct from a

Federation as that would be the consequence of an agreement, and as such would preclude secessions. He stated that "the Federation is a union because it is indestructible. Though the country and the people may be divided into different states for convenience of administration the country is one integral whole, its people, a single people living under a single imperium derived from a single source."[2] It is pertinent to know that the term Federalism does not even appear in the Constitution. Yet Federalism has been traduced, being identified with a weak State. However, this is emphatically not the case. There are over 40 nation-states that are federal in character, including the United States, Canada and Germany, but no one seriously argues that these are weak States prone to secession, quite the contrary.

It is fair to say that post-Partition, the bargaining power of the minorities, particularly the Muslims and Christians was greatly diminished. It is not as if the Constituent Assembly was not cognizant of these concerns. Indeed, the first draft of the Minority Safeguards Committee's report in May 1949 placed before the Assembly was seriously anti-majoritarian. It promised a system of joint electorates with proportional representation for a period of ten years. It suggested that minorities be included in the Cabinet along the lines envisaged by the 1935 Act, though with the caveat of 'as far as possible'. It even made a declaration that in relation to All-India and Provincial services, the claims of minorities should be kept in view while making appointments and even proposed the appointment of an ombudsman to ensure that these declarations and safeguards were implemented in practice.

From the debates in the Constituent Assembly, we can discern three particular mechanisms for protecting political representation, separate electorates, a variety of proportional representation contrivances, and reserved seats. The Muslim League representatives strongly urged separate electorates as a means of protecting the interests of the particular minority, as the representative would only be accountable to the group they were supposed to represent. This was rejected by the nationalists who argued in the words of Mahavir Tyagi, "a state cannot be a confederation of so many religions or sects or groups."[3] Furthermore, they argued that this was a relic of

colonialism, but had no place in a functioning democracy, as the role of the representatives in the colonial system was advisory, not to act as legislators.

It must be noted that several key elements of the colonial architecture for the safeguarding of minority rights were vacated by the Congress very shortly thereafter. These included the separate electorates as well as weighted representations. The other two, that of a minority quota in the Cabinet as, indeed, any quota or preferment in government service were also discarded. Ultimately, it was Sardar Patel who torpedoed the Advisory Committee's report in May 1949 as he remarked that it was "no longer appropriate in the context of free India and of present conditions that there should be any reservation of seats for Muslims, Christians, Sikhs or any other religious communities."[4] However, if such privileges were to be offered, they were confined to the Scheduled Castes and Scheduled Tribes as far as reserved seats were concerned.

In relation to proportional representation it was forcefully argued by Z.H. Lari that political minorities are entitled to be represented by representative institutions. "It is better for us to adopt this principle (proportional representation by single transferable or cumulative voting) which is more progressive in instinct and which is really democratic."[5] The nationalists were uncomfortable with proportional representation for precisely the reason its advocates proclaimed, the hope that it will attenuate 'the tyranny of the majority'. The matter of whether the-first-past-the-post system polarised Indian politics is problematical at best. If one looks at countries which have adopted proportional representation (PR), it is not evident that this by itself has precluded polarisation. For example, the 1978 Sri Lankan Constitution introduced the PR system and that was the prelude to a catastrophic ethnic polarisation that led to a civil war. Indeed, a similar political instability has been apparent in Israel, another country which has a PR system in place, generating numerous small parties which invariably subscribe to extremist positions, causing mainstream political parties to be held to ransom if they want to form a government.

Ambedkar, for one, was obsessed with political stability, as he did not see how a stable government would remain in office as "Parliament

would be divided into so many small groups that every time anything happened which displeased certain groups in Parliament they would on that occasion, withdraw their support from the government, with the result that the government…would fall to pieces."[6] Ambedkar was so fixated with security to the extent that he privileged this over human rights, lauding the introduction of preventive detention laws in the Constitution, validated by the Preventive Detention Act, 1950 allowing police officers to detain citizens on mere suspicion. Yet India had adopted the Westminster system, but with one guardrail, a written Constitution and judicial review and this was regarded as its distinguishing factor.[7]

Thus, the move to dismantle all such minority safeguards was sugar-coated and made acceptable by the pervasive belief in an independent judiciary coupled with the promulgation of a radical Constitution which compelled the most liberal members of the Constituent Assembly to revisit the need for fixed representation of minorities in the legislatures. An example of this was the attitude of H.C. Mookerjee, a Christian, erstwhile Chairman of a Minority Sub-Committee, who was very Panglossian in this regard. He stated that "there are certain people who really feel alarmed over the future of their community. Such people want to come to the legislatures because they think they can safeguard the interest of the groups they belong… but when it had passed the different fundamental rights which guarantee religious, cultural and education safeguards which are justifiable, safeguards which can be decided in a court of law, I feel the presence of people belonging to certain groups is not necessary."[8]

In fact, Mookerjee himself, on behalf of the Christian community, gave up the demand for legislative reservations in exchange for a Constitutional right central to their identity as Christians, the right to propagate their religion. In that moment of epiphany, Mookerjee conceded the Christian minority's demand for representation in favour of entrenched Constitutional rights.

According to Rochana Bajpai, the act of abolition of reserved seats for religious minorities "was pivotal. Once secured it had the snowballing effect. The removal of all other political safeguards religious minorities followed almost as a matter of consequential

adjustment."[9] Even the role of the Special Officers was strictly confined to monitoring the "backward classes and oddly, the Anglo Indians, perhaps because they were irrelevant as many were migrating in any case." Patel smugly reflected that the minorities had come to realise "the evil effects in the past of such reservations."[10]

Nehru's view on the abolition of reservations for religious minorities was more nuanced; he defended it on the basis that it was a consequence of democracy. What was remarkable post-independence was the convergence of the Hindu Right as represented by Patel and the secular nationalists like Nehru on the vexed matter of vacating reservations for religious minorities in legislatures. Majoritarianism was integral to this thinking.

Yet, the political leaders of Modern India in 1946–1947 showed scant regard to recent history. How one regards difference and pluralism must be viewed through the historical prism of the excesses of the twentieth century. As Suzanne Schneider puts it,

> It is often assumed that exclusionary political models—you know, the ones that lurk behind the last century's grim history of Partition, ethnic cleansing, and genocide-are remnants of a less civilised past. The reality is that it was modernity and the age of nationalism in particular that rendered the inevitable fact of human difference uniquely threatening. Pre-modern empires regarded heterogeneity as the natural order of the universe. Difference needed accommodation and often careful management, but not eradication.[11]

This is a lesson which was not learnt by the founders of the Constitution, despite the appalling genocides committed in the name of nationalism just a few years earlier. So, there was an inevitable prejudice against diversity and the political trajectory was directed at nation-building, showing wilful indifference to the recent history of nationalism in the twentieth century.

### *The Judiciary and its Discontents*

The minorities placed their trust in the concept of Fundamental Rights which they believed to be inviolable by the legislatures

and protected by the Courts. The whole concept of fundamental Constitutional Rights and judicial review by a Constitutional Court had been largely imported from America, following the landmark judgement of *Marbury vs. Madison* in 1803, with one important difference. In the US, the Supreme Court assumed extensive powers of reviewing legislative acts undercover of a liberally interpreted 'due process' in the 5th and 14th Amendments. In India, the task is much more onerous as regards the enforcement of Fundamental Rights.

An example of such a dialogue of Fundamental Rights which is both compelling and luminous is that which took place prior to the American Civil War when the Confederate States were seeking the right to make citizenship conditional on race (thereby excluding the African Americans). This dialogue concluded on the principle that legislatures, by reason of numerical majorities, could not abridge Constitutional Rights of a fundamental nature. Thus, the US Constitution enshrined the principles of entrenched rights and repudiated what Ronald Dworkin termed the 'the majoritarian premise'.[12]

From the 1950s the US Supreme Court has played a stellar role in expanding rights and entitlements of citizens, ending segregation in educational institutions, de-criminalising homosexuality, allowing for same-sex marriages, and entrenching abortion amongst others. The importance of the Supreme Court is gauged by the seriousness American politicians afford to their power to nominate judges whose politics align with their agenda, and the promise to their base that they will do precisely that.

In India, much of the bite of Fundamental Rights had been diluted by the convenient dichotomy between Fundamental Rights and Directive Principles, the former being enforceable in Court and the latter being principles which were idealistic, but non-binding. As Arghya Sengupta pointed out that many of the radical socialistic ideas were dumped. In his words the "directive principles provided a convenient receptacle to facilitate such fundamental compromises on ideology."[13] This in part owed to the fact that Sardar Patel had already as Chairman of the Advisory Committee recommended the right to property as a Fundamental Right.

What we have in the Indian Supreme Court, is a glorified appellate body which, rather unsatisfactorily, doubles up as a Constitutional Court as and when a Constitutional Bench is formed. Most of the judges have scant experience of Constitutional practice or jurisprudence. In an interesting new study, it was established that Special Leave Petitions constitute 92.4% of all matters in the Supreme Court and Constitutional cases comprise less than 4% of matters.[14] In addition, there is a requirement of 'acceptability' of the Court judgements. As Pratap Bhanu Mehta puts it, "It is an institution that must be mindful of the fact that it is competing with other branches of governments for broader legitimacy and that exercise of power is an intervention in an ongoing democratic discourse."[15] For this reason, he characterises the Indian Supreme Court as being 'promiscuous', which is a fair description.

The Supreme Court sits at the apex of the judicial system and is valorised as one of the three Constitutional pillars which guarantee the separation of powers. In such capacity, it sits over the High Courts, some of whom are much older and were set up by Royal Charter and have a history and pedigree going back to the eighteenth century, such as the High Courts of Calcutta, Bombay and Madras. This is often forgotten due to the vice-like control the Supreme Court exercises over the High Courts which has had a detrimental impact on their functioning and, in consequence, their standing. Regrettably, much of the autonomy of the High Courts is being eroded by the Supreme Court at the behest of the Executive.

At the time of Constitution-making, there was inevitably the existential dilemma of reconciling the matter of appointment of judges to the Bench and the need to ensure an independent judiciary. This was even more important when the judiciary had been vested with pivotal Constitutional powers of review of Executive action. It was Dr. Ambedkar who posited what was described as '*the middle course*'. In the case of the Supreme Court, this involved appointments being made at the President's behest with consultation of the Chief Justice of India and other such judges as he deems fit. In turn, the appointment to the High Court was to be accomplished by the President, the Chief Justice of India, the Governor of the State and it's Chief Justice. Then there was the question of transfers, the

process whereby a judge is moved from one High Court to another High Court, an expedient which has been taken recourse to in the case of irksome judges. This process was to be determined by the President in consultation with the Chief Justice of India. These were the protocols developed at the time of Constitution-making and were followed until the early 1990s.

In these discussions, one does not come across the term 'Collegium', which is now bandied about as if it is of great vintage, having the force of an entrenched right. This term was only introduced by the Supreme Court in 1993 in the 'Second Judges' case where the term 'consultation' had been substituted with the term 'concurrence'.[16] The Supreme Court expanded the constituency for such concurrence from that of the Chief Justice of India to a body of judges who were called the Collegium. The term was used to describe different configurations for discrete purposes. For example, for the appointment of judges to the Supreme Court and for transfers, it consisted of the Chief Justice of India and four of his most senior judges. For the appointment of judges to the High Court, it included the Chief Justice along with two of his senior-most judges, who in turn were to consult with judges of the Supreme Court who have served as judges of the High Courts in question. These protocols are listed in the Memorandum of Procedure. This is in force for the procedural part—how the decisions are to be made—but does not address the substantive issue of what criteria are to be taken into consideration when selecting a judge. This is the central problem of the *Collegium*, more so since 2014, with a powerful Executive seeking to introduce ideological criteria into the selection process.

This is not helped by what is commonly seen as the opaqueness in the entire procedure. Despite vacancies on the Bench, the Collegium made no recommendations for the appointment to the Supreme Court between 2019 and 2021, when nearly one-third of High Court positions remain unfilled. It was widely perceived that this impasse was because of the reluctance of some members of the Collegium to elevate Justice Akil Kureshi to the Supreme Court, who had made himself unpopular to the Union Government. Ultimately, he retired from service as the Chief Justice of Tripura, one of the most inconsequential States in judicial terms. But the Union Government

still retains the veto under the term 'concurrence' to appoint judges or transfer them which it has exercised liberally, and one that has practically paralysed the judicial system, if one looks at the number of vacancies particularly in the High Courts.

The malign role of the Union Government is also seen in its alacrity to veto appointments. This brings us back to the point of the criteria which should be applied in determining such appointments, and I think the liberal argument will be more credible if proper guidelines and criteria were set out binding on the Union Government as well.

The critical aspect of this debate is fundamentally the scope of judicial review of Government legislation. Constitutional bodies are not absolute, they owe their existence and legitimacy to the Constitution. This is expressly provided in Article 13 which pointedly limits the Executive power to legislate, making it subject to the Fundamental Rights chapter. The argument of principle which justifies judicial review must be, in the words of Gautam Bhatia, "the primary role of the Court was that of a counter-majoritarian institution. It existed to check the excesses of majoritarianism."[17] The most persuasive argument being, according to Bhatia, that "the Court should come to the rescue of those whom the political process—formally or effectively—excluded from equal participation." He gives the example of same-sex relations, that such relations would be viewed with great disfavour by many, but the Court would be justified in examining such laws which target this community with great scrutiny. In the case of the CAA, Bhatia cites an implied limitation in the form of secularism which the Supreme Court in the *Keshavnanda Bharati* case held to be the basic feature of the Indian Constitution, independent of the 42nd Amendment.

However, much that Constitutional liberals would applaud the Supreme Court's ruling in the *Kesavananda Bharti*'s case, the case itself is problematical as is pointed out by T.R. Andhyarujina in his book, the *Kesavananda Bharati* Case.[18] The basic structure doctrine as developed by Justice H.R. Khanna in the judgement is somewhat ambiguous in that did Justice Khanna include Fundamental Rights as part of the basic structure? Justice Khanna himself seems to be cognisant of this concern and purported to clarify his own judgement several years later in *Indira Gandhi vs. Raj Narain*.[19]

Thus, the matter of the composition of the Supreme Court is pivotal as many judges are not interested necessarily in promoting Constitutional morality, and prefer to avoid confrontation with the Government. As Shashi Tharoor, in his biography of Ambedkar, put it, the Constitution predicated the shift from an administration of law and order centred on imperial despotism to one centred on Constitutional morality.[20] What Ambedkar was concerned about was that the Constitutional morality be privileged and legalised over the traditional religiously derived morality of Indian society, which embraced the caste system and to substitute it with a "commitment to Constitutional means, to its processes and structures, alongside a commitment to free speech, scrutiny of public action and legal limitations on the exercise of power." Unfortunately, this paradigm is under threat not just because of a powerful Executive who is keen to control the judiciary through appointments, but the larger issue that the concern about diversity in judicial appointments has never been given the same importance as in other spheres of public life. Judges at the highest level continue to be drawn from upper middle class, high caste backgrounds and are largely male. In retrospect, it was shortsighted for Ambedkar to even imagine that an uppercast judiciary would be promoting Constitutional morality if it conflicted with their entrenched beliefs. It is relevant that out of 47 Chief Justices of India, at least 14 have been Brahmin. It is further relevant that until 1980, there was no judge from the OBC or SC/ST communities.[21]

Professor Mohan Gopal presents a dire and disturbing presentiment of the future of the Indian Constitution, the crux of his argument being that the collegium and the struggle between the Executive and the judiciary in relation to the choice of judges is an existential one, as the Government is interested in vacating the secular Constitution and replacing it with those most amenable to the paradigm of a Hindu Rashtra.[22] The best way to undermine the Constitution is to pack the courts with judges of a theocratic disposition, judges who look to ancient Hindu scriptures, the *Sanatana Dharma* (eternal law) or the Vedas as the source of law, the *grundnorm* as it were, rather than the Constitution. This is already apparent in the composition of the Supreme Court where there

are at least five such judges who are so inclined at the time of writing. Professor Gopal identifies this tendency in the recent *Hijab* judgement where Justice Hemant Gupta opined that *panth nirapeksha* means religion and not *Dharma* and said that the Constitution doesn't say *dharma nirapeksha*, it says *panth nirapeksha*. And he said that "dharma applies to the Constitution and actually says in the judgement that Constitutional law is dharma." What he means by Dharma is *Sanatana Dharma*. So, he's saying that our Constitutional law is *Sanatana Dharma*. He is saying we need to take into account dharma in applying the law.[23]

Professor Gopal speculates on the '*telos*' of this conceit, suggesting that by this clever manipulation of language, a *pooja* may be permitted in a government school as that is part of *Dharma*, but the wearing of hijab is not permissible as that is religion. To many, this would be a meaningless distinction. This is an interesting and disquieting take on secularism as it introduces the *Sanatana Dharma* as a source of law through the back door. So, there may not be a need to amend the Constitution as in effect the Constitution would be amended through the appointment of such theocratic judges. This understanding is buttressed by the fact that in Article 13 of the Constitution, the definition of laws includes *'custom or usages'* and as such, *Dharma* may well be construed as *'custom'* and not religion.

These examples show and, demonstrably so, the lack of a backbone in the judiciary and allude to an unctuous desire to pander to the Executive. Much of this fear and hesitation in confronting the Executive owes itself to this fetish with elections and majority rule which members of the Executive constantly harp on. The late Arun Jaitley, when judgements were delivered which did not meet his approval, spoke of 'the tyranny of the unelected', as if somehow being elected renders an evil good. This is particularly rich for a politician who was a permanent denizen of the Rajya Sabha.

It must be recalled that in the seminal Constitutional judgements on Fundamental Rights, such as the *Golaknath* case in 1967[24] and in the *Keshavanand Bharti* case in 1973,[25] the Supreme Court had observed that even a new Constituent Assembly could not change the basic structure of the Constitution which included its secular and democratic values and fundamental rights. In this context, to view

the Supreme Court as a bastion for the protection of democracy and democratic values which include secularism is not fanciful, notwithstanding serious misgivings as raised by T.R. Andhyarujina. However, the manner in which the Government has managed to influence the Supreme Court gives the impression that there is really no need for any major rewriting of the Constitution, through the appointment of opportunistic judges who invariably get rewarded for their services through post-retirement sinecures or, more disturbingly, judges of a theocratic disposition.

So the conflict is not just about whether any residual Constitutional conscience will have any purchase, but the history of the Supreme Court's judgements as far as it relates to the minority communities, have been uniformly majoritarian in character; but may be short of what a Court minded to impose the full panoply of *Sanatana Dharma* and Vedic texts consistent with what a Hindu Rashtra may attempt to do.

It was these concerns about majoritarianism and the suffocation of homogenising values that Dr. Ambedkar had warned against stating that,

> In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social economic life?[26]

I wish to examine three areas where the Supreme Court has acted with the greatest promiscuity in applying Constitutional Principles to the matter of minority rights.

15

# THE ELEVATION OF THE COW

If we look at the manner in which cow slaughter has been stigmatised post-independence, we are confronted by an issue which holds many ramifications other than to assuage hurt religious sentiments, which in my view, have been egregiously privileged. It relates to choices of diet and nutrition, an important factor in a country where a shocking proportion of the population suffers from poor nutrition. It relates to jobs and economic welfare, for the minorities as well as for the majority community, in a society where unemployment has reached epic proportions. It relates to financial priorities, as providing for cows post their milk-producing age, is hugely expensive for both, the farmer and the Government. It relates to the rule of law, as legislations have been passed that attempt to make a mockery of due procedure and rules of natural justice, reversing the burden of proof and treating something which is intrinsically innocuous, at par with dangerous narcotics as an excuse to incarcerate or kill people.

I will seek to demonstrate that irrespective of its huge economic and political ramifications, a sentiment of a minority has been greatly privileged over the rights of the many. It is worth mentioning that most Indians are non-vegetarians in their dietary habits, as much as 75%.[1] Admittedly, there may be many non-vegetarians who do not

eat beef, but this curated image of Indians being largely vegetarian is a myth.

Historically, the British had allowed Muslims to slaughter cows particularly at the time of *Eid al-Adha* (the Eid of the sacrifice). Many Hindus opposed this policy and in 1928, the Allahabad High Court ruled that cow slaughter by Muslims was not illegal.[2] The British, of course, were not entirely neutral in this matter. They wisely sought to distance themselves from the controversy, distracting the attention from those who consumed beef to those who slaughtered the cow (invariably Muslim butchers). The plain fact was that the largest consumer of beef was the British Army. Queen Victoria admitted as much in a note to Viceroy Lord Lansdowne on 8th December 1893; "Through the Mohammedans cow killing is made the pretext of the agitation, it is in fact directed against us, who killed far more cows for our army than the Mohammedans."[3]

In the Independence movement, Gandhi was a great votary for preventing cow slaughter, but was fair enough to realise that it was not quite the communal matter that the Hindu Right portrayed. He pointed out to the very lucrative export of cattle from Gujarat to Australia by the Hindu merchants of Kathiawad. He remarked that, "The cows find their neck under the butcher's knife because Hindus sell them."[4] Post-independence, cow slaughter was banned in three Congress-ruled states: UP, Bihar and Madhya Pradesh. The cow protectionist lobby, under the tutelage of Dr. Rajendra Prasad, sought to enshrine the banning of cow slaughter in the Constitution. Prior to much of the recent thinking on animal rights by the philosopher Peter Singer,[5] Dr. Ambedkar remained unconvinced that cows were deserving of rights as they were not citizens and only citizens could be vested with rights.

Despite Dr. Ambedkar's position, he accommodated the cow protectionist lobby which spoke the language of emotion; one member, Dr. Raghu Vira of the Constituent Assembly group went so far as privileging the cow over the children of the family, as the cow was the mother of the nation.[6] With such emotional froth, a compromise had to be reached. That compromise was embodied in Article 48 of the Constitution which read, "that the state shall endeavour to organise agriculture and animal husbandry on modern

scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and their milch and draught cattle." It is relevant to note that the language used in this Article has no religious character but took refuge in the idiom of agricultural economics. This is peculiar as the protection afforded to the cow in India is perhaps unique and finds no parallel in any legislation internationally.

The fact that not even the Mahatma took this pseudo-scientific verbiage seriously is evidenced by the fact that his insistence for cow protection extended only to the provinces of Gujarat, Marwar, UP and Bihar, as these were the provinces where the cow was worshipped. If one was looking to uphold a religious principle, then it would be something of universal application.

In the litigations that ensued upon the State Governments enacting legislations banning cow slaughter in Bihar, UP and Madhya Pradesh in the 1950s, the Supreme Court heard the challenge in the landmark judgement of *Mohammed Hanif Qureshi vs. The State of Bihar*.[7] In Bihar, this legislation even banned the slaughter of buffalos. The argument raised by the petitioners (mostly Muslim butchers) was that this law violated their right to the free exercise of religion as well as to pursue their occupation and livelihood. In relation to the first challenge, without seeking any expert evidence and relying on the work of an English orientalist, the Supreme Court came to the conclusion that Muslims were not required to slaughter cows at Eid but can slaughter a goat instead. In relation to the second limb of the argument, the Supreme Court held that laws admittedly did regulate and restrict these occupations; however, it did not deprive the butchers of practising them. So, it was not an absolute restriction; they could continue to slaughter bullocks, goats and sheep.

What is remarkable about this judgement is that it never called for any expert evidence on Islamic law, and, rather like the judges of the Privy Council, relied only on secondary sources and commentaries. As Abhinav Chandrachud correctly pointed out, *Bakr* in *Bakri Eid* is a cow in Arabic. It also ignored what Donald Smith observed, namely that "the cow issue is not a simple matter of religious belief but a means of asserting Hindu dominance."[8]

In fact, the Supreme Court takes it as axiomatic that in Hinduism, beef eating and the slaughter of cows is forbidden, on no basis whatsoever. In the judgement it states that, "there can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of slaughter of the cow for food is repugnant to their notions and sentiment as in the past even led to communal riots." The Court could also not detach the potential for public disturbance from the judicial pronouncement, stating that, "While we agree that the Constitutional question cannot be decided on grounds of mere sentiment, however passionate it may be, we think that it has to be taken into consideration." Once again, this matter of hurting religious sentiments comes into the picture, irrespective of any interrogation of such sentiment, a point remarked upon by Dr. Upendra Baxi[9] who was constrained to comment on the fact that the Court did not apply the same onerous standards to determine whether cow slaughter is contrary to Hinduism as it did to determine whether cow sacrifice is optional in Islam.

So let us examine whether there is any religious sanction to this practice. The consumption of beef in Vedic times is well documented. The late Professor D.N. Jha has not only cited the Vedas, Upanishads and Sutras to substantiate his argument that beef eating was pervasive in ancient Hindu culture amongst Brahmins, but that this dietary habit extended even to the Jains and Buddhists.[10] His research shows that this practice continued until the nineteenth century and after. He maintained that even the historians the Hindu Right claim as their own, such as R.C. Majumdar and K.M. Munshi, have "never disputed that ancient Hindus ate beef." These findings have been further fortified by a recent study[11] finding the presence of animal products, including cattle and buffalo meat, in ceramic vessels going back to 4,600 years at seven Indus Valley civilisation sites in present-day Haryana and UP.

Wendy Doniger, in her book on the Hindus,[12] questions whether cows are sacred in Hinduism. She concedes that they were special animals and were not publicly killed in certain regions. But, she questions the term 'sacred' as she argues that "few of us kill or eat our children, but no one would argue that they are sacred. There are few, if any, Hindu cow goddesses or temples to cows. Hindus do

not always treat cows with respect or kindness, cows are sometimes beaten and frequently half starved; Hindus will often treat cows in ways that sheltered Americans, who eat beef that comes neatly wrapped in plastic, regard as cruel."[13]

An important aspect of this case not often referred to is the impact of the outcome on the livelihoods of the Qureshi community of North India. Rohit De has pointed out that this judgement affected the two million-strong community who did not slaughter any animals other than cows and bullocks.[14] All these nuances, practical concerns and cultural taboos were pointedly ignored by the Bench who, in the words of Rohit De "chose to treat the category of butcher as an economic agent who was free to adapt his methods according to the shifting contours of regulation. The court was caste blind and ignored the limits made by the economy and community which circumscribed the Qureshis' ability to branch out to slaughter other animals."[15] This is a very serious example of judicial myopia given the size of the community affected and the pivotal role they played in the supply of food as well as ancillary products such as leather goods and hides. Their fundamental right to pursue their livelihood was abrogated on the inchoate notion of 'sentiments being hurt'. It is not a coincidence that this judgement relates to UP, which had the largest cattle population and where the cow protection movement had been active for more than a century.

Regrettably, this judgement has largely influenced later judgements on this issue and a 2005 Supreme Court judgement entitled *State of Gujarat vs. Mirazpur Moti Kureshi*[16] went even further. The Gujarat Government had enacted a law which placed a total prohibition on the slaughter of bulls and bullocks irrespective of whether these animals were useful or not and this legislation was challenged on Constitutional grounds. The Supreme Court, in a disappointing judgement, held that as the cattle had served human beings that they are entitled to compassion in their old age, a compassion which in their treatment is sorely lacking. It disregarded who was to fund this, a matter which has assumed great contemporary importance.

The Supreme Court disregarded the many political debates which had attended the controversial matter of cow slaughter, including the remarks of Gandhi, who stated that: whilst cow protection

was a laudable sentiment it must grow by patient toil and *tapasya* (meditation) and that it cannot be imposed upon anyone.[17] He even drew a parallel with Pakistan, saying that if India bans cow slaughter: "what prevents Pakistan from prohibiting idol worship on similar grounds".[18] The cow slaughter legislation marks the beginning of universalism turning intolerant on the absurdly specious argument that such activities would 'hurt sentiments'.

What we are seeing is confusion between what is best described as a taboo being sought to be imposed on persons who do not subscribe to that taboo. It is not as if there is any moral argument being presented as the question of the slaughter of living creatures is not sought to be prohibited; it is only eating the cow/buffalo that is being prohibited. In traditional societies, the breaking of a taboo would involve self-pollution and the need for purification of the self. That is what distinguishes a taboo from a moral demand. As Kwame Anthony Appiah states, "A final difference between taboos and moral demands is that breaches of them pollute mostly you: they aren't fundamentally about how you should treat other people; they're about how you should keep yourself (ritually) clean."[19] There are a few countries which seek to impose their taboos on people who do not necessarily subscribe to them. The Kingdom of Saudi Arabia is one such country, as is Afghanistan and Iran. India now falls into this unsavoury club of theocratic intolerance by seeking to extend personal religious sentiments as dietary taboos on people who do not subscribe to them.

### *Ramifications on the Economy*

Apart from the specific impact on the Qureshi community, these judgements have had huge ramifications on the agricultural economy, the leather industry and the livelihoods of many millions of Muslims and Dalits. As of 2023, India was the second largest exporter of beef in the world, and the leather industry in India is one of the largest exporting industries and a huge employer of labour in the informal economy. As of 2025, the leather industry which was around US$16 billion has been threatened by the ban on slaughter. According to

some commentators, the loss of jobs in UP by reason of the draconian anti-slaughter laws amounts to 3.5 million in the informal sector, disproportionately affecting Muslims and Dalits.

The fact that many on the Hindu Right were conscious that there is a huge economic cost involved in this project was evident from the very beginning. As far back as 1955, the Gosamvardhan Inquiry Committee appointed by the UP Government to examine the issue of cow protection concluded that the problem of the cow demands as high a priority as national defence and that this problem (the biggest that confronts the nation) would have to be addressed regardless of "the heavy expenditure involved in this undertaking, totally unproductive though it might appear for years to come."[20] In fact a JNU professor, Mr. Vikas Rawal has cautioned that the cost of looking after 27 crore unproductive cattle in India would cost the nation INR 5.40 lakh crores per annum which is five times higher than the current defence budget! As it happens, there is little in the way of *Gaushaalas* (cow shelters) which has meant that the cattle population has become a source of nuisance. According to a former IAS officer, Avay Shukla, in a blog has stated that, "If allowed to roam free, these cattle would devastate farmers' crops and create an agrarian crisis."

Quite apart from these economic costs, this also disrupts the virtuous cycle where farmers would sell cows and buffaloes which have outlived their use for cash to buy new livestock. Sunita Narain, a vegetarian environmentalist, observes that "livestock is the most important security of farmers in our world. Indian farmers practise agro-silvo-pastoralism, that is, they use the land for crops and trees, as well as, for livestock. This is their real insurance system, not banks. Livestock is also not kept by large meat businesses but by big, small, marginal and landless farmers. It works because the animals have a productive purpose: first, they give milk and manure and then, meat and leather. Take that away and you will take away the base of economic securities of millions in the country, greatly impoverishing them."[21]

*Communal Violence and Persecution of Minorities by these Laws*

In UP, the Prevention of Cow Slaughter Act and its apparent misuse by the State Government provoked the Allahabad High Court to observe that "the Act is being misused against innocent persons." It further went on to state that, "whenever any meat is consumed, it is normally shown as cow meat (beef) without getting it examined or analysed by the forensic laboratory."[22] Under the UP Government, data for the years 2018 to 2020,[23] shows that nearly 1/3rd of the arrests recorded under the draconian National Security Act (NSA) were under the rubric of cow slaughter independent of the NSA and that 1,706 cases had been registered and over 4,000 people arrested and incarcerated in relation to cow slaughter. It is pertinent that out of the 120 cases, brought under the NSA, 94 were quashed. Unfortunately, there is no breakdown as to how many of these are Muslims or Dalits, but as this is targeted towards the trade, one would imagine that most would fall in these two categories.

The matter of cow slaughter has generated a phenomenon known as cow vigilantism where persons who style themselves *gau rakshaks* (cow protectors), often patronised by political entrepreneurs, take it upon themselves to enforce the law by raiding houses, disrupting the transport of livestock and physically attacking, and, in some cases, killing persons who are engaged in this business. These people have almost *carte blanche*, as no one really seems to know the law, particularly as cattle are transported through different jurisdictions. As Aakar Patel observes: 'there is confusion arising from a full ban in some states to no ban in some and partial bans in others. There are bans on beef eating in some states, but not in other states. There are bans on the slaughter of some species of bovine but not others, on some cattle of a particular gender but not the rest. There are bans on beef possession in some states and no clarity on this in other states, and bans on transport in some places, regulations on time and temperature and carrying conditions elsewhere. There is little logic or coherence to any of it."[24] Amidst this welter of confusion, there are individual operators who, with tacit political support, act as vigilantes generally against Muslims engaged in the trade as a means of spreading terror and fear.

I have dwelt on this topic, not just because of the manifest malign intent of these laws to actively persecute Muslims and Dalits, but also the huge economic ramifications which have salience, given the fact that 60% of our workforce is engaged in agriculture. It involves coercion and violence on the poorest of our population and this does not seem to have attracted any serious attention in the public space. In fact, to discuss this subject, as Professor Jha discovered, is an area where angels fear to tread, and is emblematic of how 'culture' has displaced religious scripture in constituting 'the people's sentiment' as the law. It has also highlighted the craven pusillanimity of judges when it comes to applying Constitutional principles, vacating this mandate in favour of avoiding hurting sentiments.

16

# CONVERSIONS BECOME CRIMINAL

The matter of conversions is intimately connected with majoritarianism, as there is an enduring belief amongst many Hindus that if conversion is allowed it would result in the loss of their majority. An eerie parallel can be drawn with the Great Replacement Theory touted by the European far Right, of the white race being replaced by coloured migrants in Europe and the US. Thus it has acquired a political character with anti-conversion laws being passed in many State legislatures, with criminal penalties imposed on persons who seek to convert. At the time of Independence and until 2014, the prime target of such laws were the Christian missionaries, but now the scope of anti-conversion extends to Muslims who are accused of '*love jihad*'. What is interesting is that as a matter of practice, conversions from Islam or Christianity to Hinduism are not considered conversion but called '*ghar wapsi*' (homecoming).

Initially, the right to propagate religion was a right inserted in the Constitution itself and owes much to the efforts of the Christian Congressman, Dr. H.C. Mukherjee. During the time of Partition, there was sympathy for the Christian point of view as the Christians had refused to go along with the Muslim Leagues' demand for Pakistan.[1] Oddly, even Sardar Patel emerged as an unlikely champion of conversion in his capacity as Chairman of the Advisory Committee,

which submitted a report on Fundamental Rights. In the draft article on Freedom of Religion, the key word 'propagate' was included.

The disagreements in the Constituent Assembly debates centred around caveats seeking to reduce the scope of such propagation by annulling conversions if they were induced by fraud, coercion or undue influence. This was not considered unreasonable as this would correspond to any contractual relationship as such, and would be vitiated if these factors were adduced. The Hindu Right, led by the Congressman P.D. Tandon stated unequivocally that "we Congressmen deemed it very improper to convert from one to another religion or to take part in such activity."[2] They also targeted the matters of converting a child under 18. The objection caused a furore amongst Christians who saw the intent to delete the word 'propagate' as 'cutting at the root of family life'.[3]

As a compromise, finally Article 25 was adopted which read as follows: "subject to public order, morality and health and to other provisions of this part, all persons are equally entitled to Freedom of Conscience and right to freely profess, practice and propagate religion."

However, this right to propagate religion was steadily whittled down and important laws were passed which discouraged conversions. For example, a Hindu woman who converted was not entitled to maintenance. Conversion would also have adverse implications for the convert if he/she happened to be a member of the Scheduled Caste entitled to affirmative action. The President's order specifying Scheduled Castes[4] had a rider that "no person professing a religion different from Hinduism shall be deemed to be a member of a Scheduled Caste."

It is also relevant that in passing the Hindu Marriage Act in 1955, one of the nine provided grounds for divorce was the other party ceasing to be a Hindu by conversion to another religion. This was a matter dear to the heart of the Hindu Right. S. Natarajan remarked that while the provision was understandable from the viewpoint of Hindu marriage being a religious sacrament, he found it odd that "a secular state should not insist on further proof to establish that the conversion interferes with the religious life and practices of the other party".[5]

Marc Galanter found this to be a discriminatory anomaly, given the factual matrix of Hinduism, observing that "Heterodox practice, lack of belief, active support of non-Hindu religious groups, expulsion by a group within Hinduism—none of these removed one from the Hindu category which included all those who did not openly renounce it or explicitly accept a hostile religion."[6]

One important factor which continues to cast its malevolent influence was the Niyogi Commission Report in the 1950s in which it concluded that Christian evangelism had the agenda of taking advantage of the Constitutional freedoms to propagate religion with the aim of creating "a Christian party in the Indian democracy on the lines of the Muslim League ultimately to make out a claim for a separate State, or at least to create militant minority."[7]

### *State Legislation Reducing the Scope for Conversion*

This Report had its repercussions as it propelled efforts to introduce legislation from the 1960s to attenuate the scope for conversion and abridge Article 25. This was certainly the case in Madhya Pradesh and Orissa, with a significant Christian Missionary presence and a large number of tribals, as the upper caste Hindus were concerned at the number of conversions and attempted to make them difficult by placing caveats around this right, such as it could not be procured by force, allurement and fraud. Thus, legislation was passed to regulate such conversions under the misleading title *Freedom of Religion Act*. This stipulated a requirement that the Christian Missionary inform the District Magistrate that such conversion had taken place, so presumably the converted could be questioned as to why he/she left their religion and whether there was any inducement in such a conversion. The term 'allurement' is one rich in ambiguity as it is not confined to a material inducement: it could be a religious one, for example, a passport into the Kingdom of Heaven would suffice. If so, it could fall foul of these legislations which entailed imprisonment of one year and two years for the conversion of the minor of a Scheduled Caste or Tribe and, oddly, for a woman. Apart from the egregious criminalisation, the underlying assumption was

that people from the lower castes and women have no agency or capability to make rational choices in matters of religion.

When the challenges against the legislations reached the Supreme Court in *Stanislaus vs. the State of MP*,[8] the petitioners urged the Court that the impugned anti-conversion statutes violated Article 25 of the Constitution. It was further argued that the right to propagate would include the right to convert. In an anomalous judgement, the Supreme Court held that the right to propagate was not coterminous with the right to convert; it restricted the term 'propagate' to transmit or spread one's own religion by the exposition of its tenets. The judgement denied such a right to convert on the specious ground that it would vitiate 'the freedom of conscience' also guaranteed by Article 25. As Abhinav Chandrachud remarks, the Supreme Court forgot "that there are two people involved- the preacher and the listener. While the preacher's right to propagate religion may not include the right to convert the listener, the listener's right to conscience under Article 25 includes the right to convert to another religion after listening to the preacher."[9] This is a valid observation and once again shows the Supreme Court's bias in favour of majoritarianism, in upholding laws which clearly abridge important Constitutional Rights.

It is pertinent that this judgement in 1977 was the catalyst in emboldening other state legislations seeking to restrict conversions along the lines set out in Orissa and Madhya Pradesh, such as in Tamil Nadu, Andhra Pradesh, Arunachal Pradesh and others in a spate of competitive regressiveness. The most draconian law against conversions which, in effect, abrogates the right to conversion, unsurprisingly, emanates from Gujarat as it effectively vests the bureaucracy with the power to determine whether a person can or cannot convert on undisclosed criteria.[10] It is an extraordinary piece of legislation which requires the individuals who intend to convert to fill in a form addressed to the District Magistrate furnishing the reasons for choosing to convert, their occupation, their monthly income, whether they are Dalits or Adivasis, the date and time of their conversions and other details. If they fail to do so within 10 days of their conversion, they face one-year imprisonment. The law further enhances the punishment for propagation for three years

(and an additional year if they convert a woman, Dalit or Adivasi). The law is so draconian that, according to Aakar Patel, "the Catholic church in Gujarat has stopped offering the baptism ceremony to individuals wishing to take it. The church only baptises the children of Christians."[11] It is evident that the Constitutional right to privacy clearly does not apply to the much-vaunted Gujarat Model.

It must be noted that these anti-conversion laws have been attracting international opprobrium. The United States International Commission on Religious Freedom Report in 2021 has singled out these laws which criminalise conversion as a denial of religious freedom. The authors had the controversial matter of '*love jihad*' in mind; there have been a spate of such laws passed in BJP run states such as Gujarat, Himachal Pradesh, Uttarakhand and Madhya Pradesh.

However, conversions to Hinduism are privileged as they are not termed conversions, but what is called *Ghar Wapsi*. The anti-conversion law in Chhattisgarh specifically excludes conversion to Hinduism, and so does a law recently enacted in UP purporting to do the same. In fact, the so-called Ghar Wapsi Movement is gaining momentum as the VHP leader Pravin Togadia alleged that his organisation has converted more than 500,000 Christians and 250,000 Muslims to Hinduism during the last ten years.[12] This does not take into account Dalit and Adivasi conversions which have been substantial and therefore is a rank underestimate, assuming that what Togadia states is correct.

The British were undoubtedly interested in conversion, but by virtue of Queen Victoria's edict of 1858 which stopped British reprisals against the rebels and brought about a policy of tolerance and non-interference in India's religions, they learnt their lesson and the evangelical aspect of their rule was deliberately downplayed, except in the tribal areas. The tribal hinterlands are where the missionaries were active, particularly the North East, Madhya Pradesh, Chhattisgarh and parts of the Dang region of Gujarat. In all fairness, many of the people in these areas who converted to Christianity had led impoverished and squalid lives. The Christian missionaries provided education and thus the opportunity to better their lives. These persons, as stated earlier, are animists who do not

worship any of the Gods from the Hindu pantheon. They do not pray in temples but in sacred groves which are called the *Jaherthan*.[13] Many Adivasis have even named their religion, *Sarna* as a way to obviate their identity being subsumed into Hinduism. In colonial times, there was a provision for the tribals to choose Aboriginal as an option as their identity, which post-independence was denied to them. It must be noted that in the context of the Hindutva fetish of claiming the Aryans to be the original inhabitants of India, genetically it is the tribals who, according to Tony Joseph, "share as much of the population genetically since they carry the ancestry of the First Indians and they ought to be seen as the Foundational population for India as it is today."[14]

As a consequence of the Government's policy on conversions, there has been a concomitant restriction on the role of NGOs, some of which have traditionally been associated with the Christian church and conversions.[15] Originally, Christian organisations in Goa were targeted post-1961 as they were seen to be identified with the Portuguese and were alleged to be causing instability, even Nehru was impressed by this argument. Thereafter this prejudice acquired a life of its own, whittling down the right to convert, nominally a Fundamental Right. This is not the first example of such a right being abrogated at the altar of national security. It must be recalled that in the 1950s and 1960s, when the age of the well-funded corporate NGO had not yet happened, the main NGOs were religious organisations. The Foreign Contribution Regulation Act (FCRA), which regulates and oversees funds raised by the NGOs from sources outside India, was further amended in 2020 during the peak of the first wave of Covid-19, restricting payments to be made through one bank in New Delhi. This was after an entire cull of NGOs and the stipulation of further requirements making registration under the FCRA increasingly difficult.

The argument of the Government was that this amendment was to enhance 'transparency' and to 'stop the misuse of foreign funds by some people'.[16] This was challenged in the Supreme Court, but the law was upheld and it was largely done so on the bogey of misuse of funds to threaten national security.[17] It is relevant that the Supreme Court restated the Government's arguments without citing any

evidence in support of this alleged threat to national security. This judgment further undermines the notion of freedom of association, a principle enshrined in Article 19 (4) of the Constitution.

These amendments were ill-timed as they precluded NGOs operating in India from distributing foreign contributions to other groups or unregistered NGOs, a common device to get around the strict regime of registering under the FCRA, at a time of serious suffering. In a BBC report,[18] during the deadly second wave of the pandemic in Delhi in April/May 2021, where thousands were dying for want of oxygen, Jennifer Liang, a co-founder of an NGO known as 'The Ant', stated that this legislation cost lives as it had stopped her organisation from distributing oxygen concentrators from foreign donors and supplying them to the Government because they were unable to open a new bank account in Delhi.

It is profoundly unfortunate that the matter of conversions has become such a controversial issue that it attracts criminalisation and fundamentally repudiates the idea of freedom of religion, freedom of association and choices which were once considered to be the bedrock of the Constitution. The matter of stigmatising conversions has extended to areas such as social relationships between youth of different religions as these may come under the charge of '*love jihad*'. Not only has the attitude of the majority community denied people legitimate choices as to how they would like to live their lives, it has stigmatised the role of the NGO sector which has been under watch on the suspicion that they are all engaged in clandestine conversions.

According to Aparna Pandey, NGOs are stigmatised because of the belief "that foreign Non-Governmental Organisations (NGOs) and churches convert these individuals by offering money, jobs and opportunities to study abroad."[19] In other words, the NGOs are blamed for encouraging social mobility—something of an anathema to the Hindu Right—assuming that this is even true. In many cases the real target of this crackdown are environmental activists that pose a threat to the resource kleptocracy that India is fast becoming.

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# RELIGION, ELECTORAL POLITICS AND THE DISAPPEARANCE OF MINORITIES FROM THE PUBLIC SPACE

A question critical to the functioning of democracy is whether appeals for votes should be made in the name of religion. This is a very crucial aspect of the majoritarian agenda as it ostensibly seeks to make such a plea, including religious tropes and symbolism, normative in electioneering, the intent being to consolidate a vote bank based on religion; a vote bank on stilts.

The conundrum of religion in politics is one which is not unknown in the West, as there has been a lively debate on the critical issues of whether politicians can use religious sentiments and tropes in the course of electioneering to attract votes in the name of religion. On the face of it, such appeals in a society which is multi-religious have the indubitable effect of shutting out people who are either from another faith as well as non-believers, atheists, etc. The philosopher, John Rawls, called electoral battles as appeals to 'public reason'[1] and appeals to religious identity should be excluded. Even in the West there is a healthy disagreement. One thinker, Michael Perry, has argued that a proper pluralistic conception should include space for 'religious—moral discourse'.[2]

In this regard, given the violent history of Partition where Shruti Kapila argues that such violence constituted an expression of the general will of the Indian nation, that people, the sleeping sovereign, have the infinite capacity to once again rise up in anger and violence. There was the need to ensure that such violence was forestalled, which involved the formation of the Election Commission of India and a Model Code of Conduct, institutions which have only recently been defanged.[3]

For this reason, India's election law did not permit appeals to be made in the name of religion as the founding fathers were fully aware of the incipient dangers this brand of politics posed to the future of democracy. The *locus classicus* of this is given by the late Justice P.B. Sawant in a seven-judge Bench judgement *S.R. Bommai vs. the Union of India*[4] in which, *inter alia*, there is a robust defence of secularism. In connection with the Representation of the People Act, 1951, Sawant makes the point that "when the State allows citizens to practice and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting the pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State." The Court relied on Section 123(3) and 3-A of the Representation of the People Act which broadly prohibit appeal by a candidate or surrogates and election agents to vote or refrain from voting for any person on the grounds of his religion, race, caste, community or language or the use of or appeal to religious symbols. Subsection 3-A of the same section deals with promotion or the attempt to promote feelings of enmity or hatred between different classes of citizens on the grounds of religion, race, caste, community or language. It is noted that Ram Jethmalani argued that the prohibition was not on an appeal to religion as such but an appeal to the religion of the candidate and seeking votes in the name of the said religion. According to him, it did not prohibit the candidate from seeking votes in the name of a religion to which the candidate did not belong. The Supreme Court was unable to accept this contention and clearly held that seeking votes in the name of any religion is expressly prohibited.

However, contrary to the doctrine of *stare decisis,* the Supreme Court, in a series of later judgements, has largely supported the majoritarian agenda of bringing religion into politics through the back entrance. The landmark judgement on this is *Dr. Ramesh Prabhoo vs Prabhakar Hashinath Kunte*,[5] which marks the beginning of the rot. The charge was the violation of Representation of the Peoples Act based on several incendiary speeches by Bal Thackeray in November and December 1987. The speeches were replete with references to the protection of Hinduism, not caring for the votes of Muslims and declared that the Shiv Sena will implement the ideology of Hinduism. Thackeray was defended by Ram Jethmalani who argued that the Act was infringed only if there was a direct appeal for votes on the ground of religion and that, too, is subject to the propensity to disturb public order; a point he had argued in *S.R. Bommai*. He further argued that what Thackeray was doing was not seeking to secure votes on behalf of Hinduism, but for Hindutva which, according to him, is not a religion but Indian culture. The first argument had been expressly rejected in *S.R. Bommai*, and the learned judge who pronounced the judgement deviated from this position, without even laying out the grounds on which such a divergence from a seven-member Bench judgement was made.

The lawyer for the respondent, correctly placed emphasis on the understanding of Hindutva as elaborated by V.D. Savarkar in his book on Hindutva. To examine Hindutva without reference to Savarkar's writings, which is what the Supreme Court did, is a rather curious conceit. It is like discussing Hamlet without the Prince.

It merges the argument that Hinduism is a way of life (quoting an earlier Supreme Court judgement[6] which was dealing with Dr. Radhakrishnan's capacious definition of Hinduism) with Hindutva, a very exclusionary idea. The Court, speaking through Justice J.S. Verma, stated that it was "difficult to appreciate how in the face of these decisions the term Hindutva or Hinduism per se in the abstract can assume to mean and to be acquainted with narrow fundamentalist Hindu religious bigotry or to be construed to fall within the prohibition of the Act."[7] The Supreme Court went further in the *Manohar Joshi*[8] case where it was remarked that it was wrong to assume that references to Hindutva were axiomatically repugnant to

non-Hindu faiths, ignoring the very premise which forms the basis of Hindutva, that it privileges the Hindus of India over followers of other faiths. In fact, the Organiser (the mouthpiece of the RSS) had no hesitation in stating that "The Supreme Court has put its seal of judicial imprimatur on the Sangh ideology of Hindutva by stating that it is a way of life or state of mind and that it is not to be equated with religious fundamentalism".[9]

The Supreme Court in the *Sundarlal Patwa* case[10] yielded a split verdict, with four judges favouring the approach adopted in the *S.R. Bommai* case. The majority judgement stated that "the right to contest is a statutory right. Secularism is a basic feature. Can we give an interpretation that does not further the cause of secularism?" The Chief Justice affirmed that "the very purpose of the legislation is to ensure (that) religion should be separated from the political process." But by then the genie was out of the bottle.

The practice of using religious symbolism in electoral politics to garner votes is connected with representation at both the Centre and State Assemblies. Representation also has a crucial influence on power and decision-making as, naturally, politicians tend to favour people who vote for them in the not unreasonable expectation that when elections occur again, the very people who voted for them will continue to do so. So, the ability to tap into people's insecurities, fears and prejudices is hugely enhanced and, even weaponised by these judgements which allow recourse to religious symbolism to attract votes. It is not an accident that the BJP has at the time of writing, not one single elected Muslim MP and very few Muslim representatives at the State Level.

The consequences of privileging this kind of religion-centric politics in which unalloyed appeals are made in the name of religion as well as the demonisation of minorities that spawned after the late Justice J.S. Verma's judgement has been consequential, it has opened the floodgates for the abuse of minorities making it normative. In the 2022 UP state elections, the successful candidate for Chief Minister spoke of '80 versus 20', as shorthand for Hindus versus minorities being emblematic of this attitude.

The stratagem of presenting the principal opposition party, the Congress, as a Muslim party by the BJP, has been highly successful

in not just winning over Hindu voters to the BJP, but also inflicted collateral damage on the Muslims. They have been rendered even more isolated and besieged, as the Congress or other secular parties, anxious to shirk off this charge, engage in competitive Hindu communalism and consciously avoid choosing Muslim candidates and raising issues which affect Muslims.

This kind of politics has been catastrophic for the Muslims; if they had a minor or token presence in Parliament and State Assemblies for decades after Independence, they are now sought to be eradicated from the public space. In the Lok Sabha, their representation was 8% when their population share was 11% in 1952. In 2014, the number of Muslim MPs declined to 4% on a higher population percentage of around 14%, but without a single representative from UP which has a population of 19.26% Muslims.[11] The absence of proper representation, bearing some relationship to the population has greatly prejudiced the Muslims on matters that affect them in a singular way; security and communal conflagrations, reservations, personal law *et al*.

These issues are important examples of how the scope of religion masquerading as custom and practice has expanded since the founding of the Constitution and how, with depressing uniformity, the Supreme Court has played a complicit role in creating the infrastructure for this majoritarianism preparing the ground for the present dispensation. The term secularism has been corrupted; but not in the way the Sangh Parivar argues, that minorities have been privileged and pampered. As Aakar Patel puts it, "India's secularism is used as a carapace under which Hindutva abuses India's minorities. This contradiction is Hindutva's weakness. It is dishonest about its bigotry."[12]

# PART VI

# FEDERALISM

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# FEDERALISM, HISTORY AND THE ORIGINAL SIN

Federalism is an area of serious disagreements and these disagreements shape the future of politics and development. The dispute relates to the nature of the State whether it is unitary in form or federal in terms of the autonomy of the provinces. Before we discuss the Colonial Constitutional arrangements, it is relevant to ponder on the nature of the Indian State. In terms of geography, it is the 7th largest nation in the world. Demographically, India has just pipped China at the time of writing in terms of population being the largest populated nation in the world, numbering over 1.4 billion. Even in terms of its environment, it boasts ten bio-geographic zones, whilst the USA, which is three times the size of India has only twelve bio-geographic zones; this is the extent of its bio-diversity. In terms of language, there are around 780 spoken languages and many indigenous and ethnic communities, religious groups, castes, classes and other stratifications. This vast cornucopia of diversity is administratively bounded into 28 States, 9 union territories nearly 8,000 cities and towns and anywhere between 600,000 to a million villages. This is the complexity and plurality of the Indian State, and Federalism should be looked at in this context.

I say this because it is not obvious to me that a unitary and centralised structure is to be regarded as the normative configuration

for a State of such diversity and complexity. It is the argument that the demise of the Cabinet Mission Plan in 1946 and the Partition, led to what Dr. Ambedkar described as a dual polity in India. A Constitution which according to him "can be both unitary as well as federal according to the requirements of time and circumstances." This original sin has led to an unprecedented concentration of political power which has had serious ramifications on politics and development. We will return to this point later, but it is important to understand how we got here.

*History of Modern Indian Federalism*

Whilst it is common knowledge that the East India Company ruled parts of India through a system of subsidiary alliances with Indian rulers, headed by a Governor General who enjoyed supreme powers vested in him by Pitts India Act 1784, it was the Charter Act of 1833, that abolished the Company's trading functions and validated its role as the putative Government of India. This machinery of government was presided over by Lord Dalhousie and ushered in considerable expansion of British territory in India, including the annexation of Oudh in 1856; one of the catalysts for the Great Uprising in 1857. The critical year in Indian colonial history, however, which marks the beginning of modern India, is 1858, when Queen Victoria became the Empress of India and the Crown displaced both the Mughal dynasty and the East India Company Raj as the effective '*de jure*' ruler of British India. According to Professor Devji, the Queen's Proclamation of 1858 "stopped British reprisals against the rebels… promised a policy of toleration and non-interference in India's religions… establishing a secular order in the sub-continent that did not yet exist in the British Isles". In some respects, it can be regarded as India's Magna Carta.

This period continued until the coming into force of the Government of India Act, 1919—the Montague-Chelmsford reforms gradually introduced self-governing institutions in British India but the position at the central level remained largely unaltered. In relation to provincial governments, a system known as 'dyarchy' was introduced which was a division of the Executive branch of

each provincial government into authoritarian sections (Executive Councillors appointed by the Crown) and popularly responsible sections (Indian ministers chosen by the Governor). In practice, the ministers were assigned particular subjects whilst the Governor continued to wield substantial powers. The provincial autonomy was further constrained by provisions that permitted the Central Government to supervise and veto provincial legislation. For the Indians, this was a highly unsatisfactory state of affairs. However, it was very much within the good British tradition of extending promises and illusions of reform and agency without ceding much power.

Thereafter, the Government of India Act of 1935 was a product of the Simon Commission in the 1920s and the subsequent Round Table Conferences which commenced in 1930 and which proposed an All-India Federation. The four principles which had been accepted and are enshrined in the Act are, Provincial autonomy; an All India Federation; Central responsibility and Safeguards relating to the security and stability of the various Governments. Interestingly one of the reasons behind the moving of this legislation was stated by Sir Samuel Hoare when he proposed that "Indian questions, such as the question of child marriage, of temple entry and of the depressed classes, have been thrusting themselves more and more upon public attention, and more and more it became clear that these questions could be dealt with effectively by responsible Indian politicians."[1]

This Act was clearly a precursor to some form of Dominion status and was driven in part by the coming into power of the Labour Government under Ramsey Macdonald, which was keen on preparing grounds for responsible government for India. Reactionaries like Churchill were highly critical of it, calling it "a gigantic quilt of jumbled crochet work, a monstrous monument of shame built by pigmies".[2]

It was Sir Tej Bahadur Sapru, who had been making the case for a federal system of Government in which he sought the backing of the rulers of the Princely States for unity with the rest of the country. The 1935 Act, therefore, was an important development in the creation of a fledgling democracy as it extended the franchise to around 35 million people and vested the eleven British Indian

provinces with a fair measure of self-government. It also defined the legislative powers in separate lists, the Federal, the Provincial and the Concurrent. The residuary powers, which were basically powers not specifically stated in the lists, were vested with the Governor-General who had the overriding power to allow either the federal or provincial assemblies to pass laws which figured in any of the three lists. Subject to these powers, the provinces were to acquire substantial autonomy on elections being held. However, for the Federation to come into existence, half the Princely States had to voluntarily agree to accede to the Federation by way of separate instruments of accession.

Thus, while the British-controlled provinces would automatically enter into the Federation, the terms on which the Princely States acceded were to be determined. Unfortunately, many of the Princely States were reluctant to enter the Federation and were fearful of the Congress and the demand for democratic government. So, absent the participation of the Princely States, the federal dream was compromised. This, I think, was very unfortunate, as it retarded the growth of powerful regional sentiments and political equations which would have acted as a counterpoint to extreme nationalist sentiment.

Ayesha Jalal states that "the debate on the relationship between the federal centre and the federating units could assume real significance only when the British were ready for the transfer of power. At this time, this was not likely to happen. The Act had been designed to safeguard British rule in India, not to weaken it."[3] This analysis of the 1935 Act is sound and further buttressed by the very design of the legislature in which Princely States and minorities were privileged with the intent to dilute the power and impact of nationalists. Yet this experiment had the impact of greatly increasing the popular entrancement with democracy even though the franchise was limited, just over 14% of the population were enfranchised. Such was the impact of elections and the 1935 Act, that it popularised the Congress party dramatically. The Party membership increased exponentially from 500,000 to 4.5 million in 1938.[4]

This period between 1935 and 1946 represented a serious churning of issues between political parties as the presentiment of

imminent popular sovereignty transfixed the political actors as well as the Colonial Government. For the history of Federalism, the Cripps Mission of 1942 was significant in that it buttressed the principle of provincial autonomy, including the right of the provinces to refrain from joining the Union. As Arvind Elangovan put it, "Cripp's declaration for the establishment of the constituent assembly was made subordinate to the right of the provinces to secede, thereby giving primacy to the question of communal differences, rather than the stated task of framing a Constitution for a united India."[5]

The next most significant step was the Simla Conference in 1945, presided over by the Viceroy Wavell, who was anxious to devolve much of the powers of Government onto a new Executive Council which in line with colonial policies would consist of parity between Hindus and Muslims as well as representation to be given to the Sikhs and the Scheduled Castes. This, of course, was to be an interim arrangement with the Viceroy continuing to remain responsible to the British Parliament as well as the maintenance of the British presence in India. This was seen as a precursor to Dominion status. Unfortunately, the Conference served as a catalyst to excite latent differences, for example in the case of the Unionist Government of Punjab which ruled a Muslim-majority province posed a challenge to Jinnah's claim to be the sole spokesman for the Muslim community. The issue of parity upset a number of Hindus. The Simla Conference failed for various reasons, but the issue of representation was seminal.

The matter of the formation of the Constituent Assembly was central to Congress's argument that this body would decide the Union Constitution and frame the parameters of the provincial Constitutions. Nehru stated his views on provincial autonomy that "While the Congress contemplated autonomy for the Provinces that meant internal autonomy, it was quite another thing for autonomy to be used to create the new piece of Constitutional machinery going beyond the boundaries of the Province."[6] This was diametrically opposed by Jinnah who argued for provincial autonomy by suggesting that provinces and groups of provinces need to meet separately to determine their own Constitutions and work in tandem with other provinces for the purpose of framing the Union Constitution. So, the Federalism envisaged by Jinnah was one that was to be critically

determined by the States as to what powers they retained and what powers were to be ceded to the Union Government.

It was the Congress party which both encapsulated and appropriated the freedom movement and had the interest in shaping the contours of nationhood and it was its insistence on a powerful unitary structure that prevailed, even at the cost of a United India. Accordingly, one of the seminal Constitutional precepts which was upended by Partition was Federalism which cannot be divorced from the events of Partition. To make such a diverse and plural society governed by a largely unitary structure is fairly unique and one fraught with the dangers of incipient homogenisation and consequent strife or blowback. The only comparable States in the twentieth century one can think of that attempted this ambitious goal were the USSR and Yugoslavia, neither of which exist today.

### *Nehru and Federalism*

Many of Nehru's ideas on Federalism were not just shaped by the trauma of Partition, but by the need to negotiate and navigate future arrangements with the Princely States who comprised nearly 40% of the landmass of India. To offer states within British India the indulgence of seeking treaty arrangements to become part of the new Republic would involve much bargaining. As Louis Tillin put it, "While the eventual integration of the Princely States did involve fusing entities with different prior states, this integration was not a result of equal bargains with hundreds of individual states."[7]

During the period of Constitution-making, the Princely States had already acceded so that could not have been a politically decisive consideration, but legally it was. Once the states became part of the Union, they lost the agency that treaty arrangements brought and this accelerated the configuration of the dual polity. The need for a unitary structure was indisputably linked to central planning, inter-state transfers as well as major social and economic reforms.

When the Cabinet Mission plan was dumped and Partition was accepted, many Congress leaders found themselves liberated, most notably Nehru, who spoke for many when he pronounced: "Now that Partition is a settled fact, we are unanimously of the view that

it would be injurious to the interests of the country to provide for a weak central authority which will be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere."[8]

*Early Federalism and the Original Sin*

The early years of the Constitution concealed some of the flaws or, what I would call the original sin in the structure of the Constitution in federal matters. In the formative years of the Republic, there were numerous states with elected leaders who had gained experience under the Government of India Act, 1935. These leaders developed political followings and had a deep understanding of their states and thus did not look to the Union Government for support or patronage. This autonomy was reciprocated by the Congress leadership, particularly Nehru when it came to interactions with state governments. It also helped that there was a Congress hegemony which made any issues between Union and States intra-party differences which could be resolved amicably.

The 'flexibility' which Ambedkar referred to is singular and can be traced in Constitutional developments. For example, it allowed for the Union Government to alter the borders of existing states through a division of territory under Article 3 of the Constitution. It is remarkable that these powers could be enforced on the basis of the sanction by a simple majority and, more importantly, did not require consent of the state concerned. The recourse to this Article was an important instrument in addressing the linguistic issues, as states were largely reorganised according to linguistic lines, such as Bombay, divided between the new states of Gujarat and Maharashtra.

This decision was challenged in the Supreme Court and the Supreme Court made an important ruling in *Babulal Parate v. State of Bombay*[9] in which it effectively stated that the states had no power to object as they had no rights under the Constitution. It observed that "none of the constituent units of the Indian Union was sovereign and independent in the sense the American colonies or the Swiss Cantons were before they formed their federal unions. The Constituent Assembly of India, deriving its power from the sovereign

people, was unfettered by any previous commitment in evolving a Constitutional pattern suitable to the genius and requirements of the Indian people as a whole."[10] As Louise Tillin observed, "the creation of linguistic states helped to alleviate potential tensions between an Indian national identity and regional identities shaped profoundly by language."[11]

However, with the drift of Indian public policy towards caste considerations, we see a new factor at play. With the desire to empower the Scheduled Castes and Tribes to acquire political salience, states such as Jharkhand and Chhattisgarh were formed to accommodate their interests. One of the most recent examples of such a creation of a new state, unique in that it was driven by development goals, is that of Telangana when it broke off from Andhra Pradesh in 2013. The agitation for this new state was based on unequal economic development; this allegation was supported by the findings of the B.N. Shrikrishna Committee Report in 2010. The creation of the new state has been a success story as Telangana has been one of the fastest-growing states in India, posting an annual growth rate of nearly 14% per annum over the past five years. As P. Ishwara Bhat states "formation of Telangana is a strong warning to all the states to avoid regional disparity within them."[12]

The recent Supreme Court judgement on the abrogation of Article 370 insofar as it purports to deal with Article 3 goes further in vesting the Union Government with extraordinary powers.[13] As Article 3 permits the alteration of boundaries of a state, it's name and identity, it does not permit the Union Government to alter the status of the state itself as the Jammu & Kashmir Reorganisation Act purports to do and demean it to the status of a Union Territory which the Supreme Court has done on the basis of a non-binding representation by the Solicitor General that statehood will be restored sometime in the future. As Pratap Bhanu Mehta puts it, "Performatively, the Court ended up saying 'The whole of the Constitution of India applies to Jammu and Kashmir. But not yet.' A curious performance indeed."[14] In fact, this aspect of the case creates new and horrible vistas for future Union Government interference in states it considers unfriendly to it.

This may be true but in the recent judgement on the abrogation of Article 370, the Bench stated that it was bound by the judgement in the *Babulal Parate* case, adopting the view that the concurrence of the State Legislature was not required in relation to the break-up of the state into two Union Territories. However, this reasoning is specious when the state is under President's rule under Article 365: the question being the propriety for the Union to make such a seismic change to a state absent the consent of a democratically elected assembly.

The Congress hegemony concealed the true nature of the Unitarian nature of the Indian State for at least the first three decades. Two scholars, McGarry and O'Leary have commented that any devolution still leaves the power with the Central Government, it is not a bargain between national or ethnic communities. It is often in the hands of the dominant nationality or ethnic community and fails to secure what in their words amounts to 'a plurinational partnership of equals'.[15] The consequence of this that they conclude is that India has almost negligible protection for minorities which would normally align with 'full pluralist federations'.[16]

If we go back to the Government of India Act 1935, it was responsible for adumbrating the demarcation of powers in the Union List, the State or Province List and the Concurrent List. This methodology was adopted in the Constitution with Article 249 and is one that centralising governments have taken recourse to with great alacrity. This Article gives license to the Union Government to encroach on the subjects set out in the State List, by referring the matter to the Rajya Sabha where the power to legislate on subjects in the State List is transferred to the Union Government. The conditions predicating such a transfer are suitably vague, necessity or expediency in the national interest, qualified by the necessity of a two-thirds majority of members of the Rajya Sabha to vote on it. This provision undermines Ambedkar's argument of a dual polity. In my view, you either have a strict delineation of powers: or you don't. In the case of the latter, you cannot then properly call yourself federal.

Neither Nehru nor Ambedkar had the prescience to see the pervasive centripetal forces in Indian administration and politics

which regrettably are very much hardwired into political thinking, precluding the American fetish with checks and balances to be written into the Constitutional architecture. There was too much of an infatuation with English Constitutionalism such as the prominence given to 'Constitutional Conventions' in the mode of Bagehot and Dicey, for example, on the role of Governors and a touching faith placed in a vigilant judiciary. Conventions do have value, as Gautam Bhatia observes, "A written Constitution can reduce the extent to which governance relies upon conventions. It cannot, however, eliminate them. The range of human behaviour can never completely be captured in a text."[17] But they are only efficacious if there is a consensus on Constitutional principles and morality, given the character of the opportunistic and largely criminal political class to expect them to align with constitutional morality is illusory.

### *The Misuse of Article 356 and the Judiciary's Abdication of Responsibility*

One of the most controversial provisions in the Constitution is Article 356, it replicates Section 93 of the Government of India Act, as Sengupta points out, "The conceptual foundation for the overwhelmingly strong Union was firmly in place by August 1947. In this light, it should not come as a surprise that despite Sections 93 and 102 of the Govt of India Act on the powers of the unelected Governor and Governor General being colonial vestiges, they were endorsed by Members of the Constituent Assembly with great enthusiasm."[18] Section 102 relates to the emergency provisions. This power was surcharged with the provision that in the event of a President's rule in a state, the President would have the power to suspend all Fundamental Rights including the right to move the Courts for redress. This power is draconian in the extreme.

This provision, Article 356, was taken recourse to with uncommon enthusiasm as it authorised President's Rule on grounds of perceived 'instability' of state governments. Chief Ministers were then side-lined and the institutions of democracy were suborned. These provisions regarding the definition of perceived instability, owe their provenance to Germany; in Germany these circumstances

where governments can be suspended are meticulously defined. They leave little or no discretion, making it difficult to misuse these provisions. Unfortunately, Indian politicians take advantage of this vague terminology which has been accompanied by a marked decline in the character and quality of Governors, who are increasingly pliant political hacks rather than persons of integrity.

Under Indira Gandhi and, post-2014, Article 356 has been used almost invariably as a political instrument against opposition or regional parties by the Union Government to expand its *puissance*. During Mrs. Gandhi's tenure from 1966 to 1977 and from 1980 to 1984 it was used 50 times, and post 2014 around 9 times. The most recent instances of such use have been in the case of Jammu & Kashmir, Karnataka, and Arunachal Pradesh. It must be stated, as a caveat, that toppling a Government by inducing the crossing over of MLAs, has been the route adopted with the greatest alacrity.

Fortunately, the matter of Federalism was revisited in a nine-judge Bench in *SR Bommai vs. Union of India*[19] in the 1990s in which the majority judgement recognised the political realities that influenced the exercise of such proclamations under Article 356, and remarked that "the State Government has been sacked and the legislative assemblies dissolved on irrelevant, objectionable and unsound grounds." Justices P.B. Jeevan Reddy and Aggarwal issued a trenchant warning against the misuse of this power, stating that "it is not a power conceived to preserve or promote the interests of the political party in power at the centre for the time being nor is it supposed to be a weapon with which to strike your political opponent." The Court went on to record at least ninety instances of this Article being misused against the States' Governments run by opposition parties. It is a significant judgement in that it makes clear that the Supreme Court, in the words of Sudhir Krishnaswamy, "identifies the judicial role in the preservation of the federal Constitutional arrangement by negating the place of partisan considerations in federal decision making."[20]

The *Bommai* judgement has been consequential in at least reducing the widespread imposition of President's rule, according to Alok Prasanna Kumar of Vidhi, from about 2.5 times a year to once a year.[21] Nonetheless, even recourse to this provision is excessive.

Supriya Sule commented on the fact that the NDA Government from 2014 had the unenviable record of toppling nine State Governments in nine years.[22] As Sengupta puts it "For a Constitution that proclaimed itself federal with division of sovereignty between the Union and states, both being supreme in their respective domains, the reversion to a unitary and unaccountable form of government during any disturbance in a state was unexpectedly quick."[23] It also demonstrates an incorrigible predilection for centralisation.

Oddly enough, the *Bommai* case was relied on by the Bench dealing with the abrogation of Article 370 and the creation of two Union Territories. The Bench had to address the argument that the Union could not have made such a seminal change during a period of President's rule. The Chief Justice himself admitted that the purpose of the Constitutional arrangement in the Article is to restore the functioning of the Constitutional machinery in the state. There has to be a proximate relationship to the object and purpose underlying the suspension of the Constitutional machinery in the state. It is thus not unreasonable to assume that the President's rule can only allow for day-to-day administration of the state. It cannot be used as an instrument to take away Statehood as that emphatically would not bear any proximate relationship to the underlying object and purpose under Article 356. In other words, the Supreme Court in this case has ignored the doctrine of implied limitations set out in the *Bommai* case, and opened the prospect of a state being converted into a Union Territory, absent any consultation when it is placed under President's rule.

### *The Role of the Rajya Sabha*

With the advantage of a bi-cameral legislature, one would have envisaged that this institution would have a defined role within the Constitutional framework. It purportedly represents state interests in that its members are indirectly elected by the state legislatures. However, the baleful English Constitutional influence on its role is apparent as its purpose appears to be confined to reducing the legislative burden as the site for the first introduction of bills together with the Lok Sabha and as a platform for debate, like the House of

Lords. It should have been modelled more on the US Senate, if a federal structure was to be taken seriously. The Rajya Sabha does, however, enjoy a veto when it comes to a government trying to push through a Constitutional amendment. The Rajya Sabha also enjoys the power of exercising the formality of parliamentary approval of a Proclamation when the Lok Sabha is dissolved.

It is thus apparent that whilst the Rajya Sabha is meant to ostensibly represent State Legislatures, it was never designed to act as a platform for regional demands in any substantive way.[24] Louise Tillin identifies the intrinsic limitations in the form the Rajya Sabha has taken, commenting that, "states are represented on the basis of their population rather than on an equal basis, the territorial pattern of representation within the Rajya Sabha essentially mirrors the Lok Sabha. Rajya Sabha MPs are typically more likely to vote on party lines."[25] We have thus the appropriation of the Rajya Sabha by the very same political credo that prevails in the Lok Sabha. The fact that the Rajya Sabha is not very different from the Lok Sabha in its political composition as well as its amorphous role as a second legislature was a hugely wasted opportunity. As it happens, the role of the Rajya Sabha is sensationally modest: at the highest it is an echo chamber of the Lok Sabha, at worst it is a refuge for placemen and political has-beens.

It would have been entirely possible for the Rajya Sabha to represent the states along American lines where each state, irrespective of its population, is entitled to a fixed number of representatives as in the Senate. The rise of regional parties in India has given impetus and support to regional demands and aspirations and such a political space could well be a platform to showcase federal principles, representing the plurality of the country.

The leading judgement on Federalism in the Supreme Court, *Kuldip Nayar vs. Union of India*[26] was concerned with the territoriality of representation. The petitioner, a veteran journalist and former Rajya Sabha member, challenged the 2003 amendment to the Representation of the Peoples Act, 1951 which purported to entrench the notion of non-territoriality. He argued that this amendment violated the principle of Federalism in that it detached the requirement that a candidate for elections in the Rajya Sabha

must be an "elector for a Parliamentary constituency in that State or territory." The amendment was agnostic as to where the electors were to come from and there was no stipulation that they should reside in the state. The amendment was upheld on the basis that, according to the Supreme Court, "the principle of federalism is not territory related."

It is clear that various reforms have been proposed in relation to the Rajya Sabha, in the words of Rekha Saxena, to shed "its image of being a parking lot for those who cannot ensure their election from a popular constituency."[27] This is, unfortunately, its current image and not without reason. Rekha Saxena points out that there are over 30 Rajya Sabha MPs whose net worth exceeds INR 10 million, many are non-domiciled candidates and, at least in the last Parliament, 57 of them had criminal cases against them. These facts lend the impression that the Rajya Sabha is essentially a club where odious plutocrats, such as Vijay Mallya, the now-discredited liquor and airline tycoon, could essentially buy their way into Parliament. A Rajya Sabha seat also enlarges the possibility of political horse-trading that was seen in 2020 relating to the allurement of Jyotiraditya Scindia, the Congress scion, to the BJP in return for a Rajya Sabha seat and a cabinet position which led to the collapse of the Congress Government in Madhya Pradesh.

The most imaginative of reforms of the federal structure were outlined in the M.M. Punchhi Commission Report on Centre-State Relations published in 2010 which made several path-breaking proposals including the retention of the domiciliary clause and, critically, allowing for equal representation to the states, panchayats and municipalities in the Rajya Sabha with the intent of buttressing Federalism within the Constitutional matrix. This is controversial, as it is difficult to envisage states such as UP, Bihar and Maharashtra divesting their hegemony, and even more difficult to see states concede representation to local bodies such as municipalities. But not just because of the increasing urbanisation, but also for recognising the centrality of urban development to economic growth. A city like Mumbai is the richest municipality in Asia, but it continues to be a mere municipality and, other than the six Lok Sabha seats and its

representation in the State Assembly, it has no independent voice in Parliament.

If wholesale reform of the Rajya Sabha is required, it is pointless to effect such change without extensive devolution of powers not just to the states but, within the states, to municipalities, who should be vested with greater power in relation to raising resources and have autonomy over investment decisions which they should own. The Constitution left the shaping and contours of administrative decentralisation for the states to determine. The process of devolution cannot stop at state level given the ballooning urbanisation of India and the centrality of cities. It must be noted that by 2030 nearly 70% of India's GDP will come from urban India which remains substantially unrepresented.

*Federalism and the Judicial System*

It is not an obvious point but whilst we have looked at how the judiciary has viewed the federal argument, the question of a federal judiciary being integral to the workings of a federal system is rarely discussed. This, unfortunately, is a product of the English system which shapes much of our judicial thinking when the US system is the more appropriate one to examine, as our Courts function within the praxis of a written Constitution and are required to have 'a Constitutional conscience'.

Dr. Ambedkar had voiced the view that the "Indian Federation though a dual polity has no dual judiciary at all. The High Courts and the Supreme Court form an integral judiciary having jurisdiction and providing all remedies in all cases arising under the Constitutional law, civil law or the criminal law."[28] This is not entirely accurate as the Supreme Court has special powers under Article 142 to intervene in special cases where it feels the ends of justice should be served. However, the High Courts of the Presidency cities, Calcutta, Bombay and Madras were of great vintage and had illustrious histories. This was evidenced when Justice M.C. Chagla, on being offered a Judgeship in the Supreme Court, rejected it on the basis that he would prefer to continue to act as Chief Justice of the Bombay High Court.[29]

Shridevan and Pattabhiraman have identified another aspect where the Executive has degraded the role of the High Courts and that is through passing legislations that create what they characterise as a "parallel judicial systems of Courts and Tribunals which provide for direct appeals to the Supreme Court bypassing the High Court." An example which is particularly germane to an incipient kleptocracy is the Competition Commission, which should play a critical role in ensuring competition in the economy and preventing monopolies. In the context of rampant crony capitalism, this issue is seminal. These Commissions have been staffed by ex-bureaucrats or retired judges known to be pliant and any appeals from an adverse order go directly to the Supreme Court, bypassing the High Court on which the Executive may not have corresponding control. This factor also applies to the National Company Law Tribunals, now vested with great powers over the Corporate sector, including validating settlements with banks and third-party creditors for cronies. Anil Ambani's Reliance Communications owed INR 47,857 crores to 53 banks and a settlement was arrived at under NCLT at INR 459 crores, less than 1% of the debt, such favours can only be bestowed under the guise of a court settlement.[30] This is deeply worrying and constitutes a major assault on Federalism. These are matters to ponder, and it is difficult to disagree with the conclusion Shridevan and Pattabhiraman come to that "the greater the degree of centralisation of the judiciary, the weaker the federal structure."

### *Administrative Federalism and the IAS*

Despite pieties about decentralisation in the past, even during the halcyon days of coalitions and regional parties, the fact remains that political decentralisation has never been accompanied by any tangible administrative decentralisation, critical for the delivery of public goods. It has been demonstrated in states like Andhra Pradesh in the 1980s that to decentralise sub-districts into *mandals* resulted in better public goods distribution in villages.

The one substantive impediment to decentralisation which buttresses the unitary character of the Indian State is the Indian Administrative Service (IAS), the successor to the colonial Indian

Civil Service (ICS). The IAS is a national bureaucracy which is centrally recruited and the recruits are then assigned to state cadres. In the Constituent Assembly debates, when serious questions were raised about reform of this colonial vestige and its future in a free India, there were disagreements. Nehru wanted to do away with the ICS and replace it with a civil service more attuned to development. It was Sardar Patel who opposed this, arguing that the "Union will go—you will not have a united India, if you do not have a good all India service."[31] Like in most things he got his way and India has had to pay the price. This thinking was unfortunately suited to a colonial paradigm, it was not intended for a State active in developing human capital and delivering public goods. As Karthik Muralidharan puts it, "The main goal was not the welfare of the population, but rather to extract the surplus from India's land and its people to finance the colonial army and the opulence of its rulers."[32]

Unfortunately, debates over the reform of the IAS have centred around issues such as the generalist qualifications of the recruits, the lack of domain specialists, the need for diversity in caste terms and the need to insulate the service from political interference. These are all legitimate concerns, but the IAS and the partnership between the Union and the states rarely gets the attention it warrants.

In 2022, the Union Government took the unprecedented step of wresting its share of the IAS officers from the state and asserted its hegemony over the entire government administrative service in an act that has been defined as combative Federalism.

What has been apparent in recent times has been the senior bureaucracy interacting with the Union Government and bypassing the state governments. The acme of this trend has been the recent tendency for the Prime Minister to hold regular meetings with Chief Secretaries of the states to review schemes and projects relating to matters in the State List. This tendency is reinforced by the brute reality that the Union Government not only controls recruitment, but exercises disciplinary procedures in relation to the highest ranks of the civil service which fosters a culture of sycophancy where some members of the senior ranks genuflect before the Union Government for preferment and even foreign postings.

The importance of certain key and trusted IAS officers is particularly apparent in the Gujarat model of development which has been superimposed on India since 2014. As Narendra Modi works through certain trusted bureaucrats, to push through policies without necessary political consultation or consensus or even cabinet involvement. This notion of a trusted bureaucrat and one whose views align with the Prime Minister may not be new, but it has acquired seminal importance in recent years.

One aspect of the bureaucracy according to Muralidharan is to learn from China where public servants are measured on their performances and are rewarded accordingly. This is also accompanied by greater autonomy to officials and decentralisation of budgets.[33] Performance and outcome seem to be at a discount in our bureaucracy where pay grades are risible and the culture is rooted in the colonial paradigm. Even more telling is the size of the bureaucracy. The Indian bureaucracy is grossly understaffed. Muralidharan states that India only has 16 public employees per thousand people. In comparison, China has over three times as many, (57) and Norway has ten times as many, and even the USA has 77 public employees per thousand.[34] The absence of qualified and incentivised public servants in sufficient numbers derails and undermines Government.

However, politicians see things differently. The colonial paradigm suits them as it enables them to get their way and run Government as they wish. The need for friendly bureaucrats acquires political significance in the current Union State context, where troublesome journalists, opposition politicians who might prove to be a threat to their hegemony and pesky civil rights activists are neutralised. The Union Government retains control of the Central agencies, the Income Tax Department, the Enforcement Directorate, the Central Bureau of Investigation and the National Investigation Agency and these agencies afford the Union Government the power to raid, investigate and, in some cases, incarcerate potential dissenters or opponents as has been seen with the Chief Minister of Delhi, Arvind Kejriwal. As we are aware, the political funding of elections involves access to and retention of large sums of illicit funds. This is the norm for all political parties. But, if you have the advantage of having investigative agencies and the entire paraphernalia of the State at

your disposal, it is tempting to use them against political opponents amongst others. The extent to which opposition parties are raided as opposed to the ruling party is around 95% to 5%.

The ruling party would aver that there have been no scams or incidents of corruption, but given the nature of political funding and many examples of crony capitalism, this is difficult to digest. The Union Government's attitude to the rare media reports concerning any hint of scandal or financial impropriety is to simply brazen it out, whether it be a possible defence scam like Rafale or the Pegasus intrusions. In part, this arises from what Yascha Mounk describes as the 'moral monopoly of representation', populist leaders sacralise their authority, whereby the opposition's criticisms are disparaged as anti-national behaviour.[35] This aligns with the position that only opponents of Government are to be investigated and punished. According to Dushyant Dave,

> A pattern emerging over the last seven years shows that only a section of citizens is being acted against by the state. They belong to the Opposition and the minority community or are activists, dissenters and the like. It is not being suggested that they should be spared if they have violated the laws. But the pattern reveals that the state is merely interested in targeting them without credible evidence and giving wide publicity to its actions, unconcerned with ultimate results.[36]

Accordingly, there is a definite fear psychosis pervasive in the country and particularly amongst opposition politicians, regional parties which imperils their agency to act as an effective opposition.

As is now evident, Dr. Ambedkar's original sin was to assume a federal architecture which could be multi-purposed and flexible instead of building and investing in federal institutions and developing capacities and ceding autonomy to support them, a certain leeway was allowed for the Union to encroach on the State List; a process permitted under several Articles of the Constitution, the recourse to which has now become depressingly routine. The states have allowed themselves to be trampled on in this way because of the party system smothered by centralisation and the absence of inner party democracy, a colonial bureaucracy and police service.

If they do not fall in line, then the Union Government can impose Presidential Rule under Article 356 of the Constitution, it can financially penalise them or terrorise them with investigations on the most spurious of charges. This fear makes states averse to taking risks, taking a cautious role rather than being proactive, ever fearful of when the tap may be switched off.

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# RECENT PROBLEMS WITH FEDERALISM, THE 15TH FINANCE COMMISSION AND THE RISE OF KLEPTOCRATIC FEDERALISM

In this respect, Amitabh Pande has identified three critical trends which marked the period post-Emergency to the present day that have been sensationally accentuated post-2014. First, is the spectre of terrorism, very much aligned to the thrust of the new nationalism, which boasts zero tolerance. This has, in his view, led to a proliferation of both "military and paramilitary forces to unprecedented levels." This subject has been adequately dealt with in the chapter dealing with Asymmetric Federalism. Secondly, the crafting of economic welfare priorities by the Union Government, which accords it with what it deems necessary and involves the raising of economic resources to fund these schemes. These invariably bear the imprimatur of the Union Government, and even the smiling image of a beneficent Prime Minister. The states are reduced to a subaltern status of implementing essentially someone else's priorities, irredeemably diminishing their agency. This is important in charting the progressive 'telos' of the stark politicisation of economic benefits under the State List and their appropriation by the Union Government. Finally, Pande points out that the consequence

of this policy is the "emasculation of the capacity of the states to raise their own resources for their own priorities."[1] Clearly the Centre wants to push its agenda at the cost of the states, and substantively so as the taxing powers of the states have been severely attenuated. This observation is critical as it demonstrates how this creeping centralisation is substantive in character and is designed to further buttress the unitary trajectory that powers this new nationalism.

It is not just the matter of the Union Government encroaching on the domain of the states' autonomy, but since 2014 we have seen a charismatic and powerful leader in place who has aggrandised Executive power to a degree that has not been seen since Indira Gandhi. Pande describes him as "an authoritarian leader who believes he has the people's mandate to impose his will everywhere across the land and it is incumbent on all states to follow that without asking questions."[2] So health and education have suffered, as is evident, owing in large measure to lack of funding and the deficiency of administrative expertise. As Romila Thapar remarks, there has been no dearth of resources for the funding of expensive gimmicks "such as the bullet train, or the tallest statue in the world, or the redesigning of the Central Vista in New Delhi, all of which were and are uncalled for."[3] These are essentially vanity projects, and showcase where the Government's real priorities, which are invariably the creation of cynosures of machismo, lie.

We have also witnessed an unprecedented and insidious degree of political intervention in the workings of the 15th Finance Commission and the amendments of the Terms of Reference (ToR) which have the effect of privileging UP and the cow belt at the cost of the southern and eastern states.[4] It is for these reasons that the matter of Federalism assumes such importance at this juncture in the Republic. In fact, according to the 2022 World Economic Forum at Davos, the principal country risk identified for India was 'fractured inter-state relations.'

Under the 'aegis' of the new nationalism, the Union Government has heralded excessive centralisation of power at the expense of Federalism. The 15th Finance Commission's ToR have been emasculated in favour of political partisanship, in particular updating the population figures of the states from the 1971 census to 2011 to

deliberately reward states which have done the least to control their population growth but are politically critical to the BJP.

Whilst this may have been the most egregious alteration in the ToR, there is a pervasive unitary mindset at work which assumes that the Union Government knows best, as the Finance Commission is required in accessing financial requirements of the states to take "expenditure on populist welfare measures into account when framing performance-based incentives."[5] This makes the unfounded assumption on the glib binary that all Central plans are anti-populist and all state legislation is populist. Needless to say, there is no proper definition of what 'populism' entails.

We do a serious disservice to many of the allegedly populist schemes which have emanated from the states and have proved successful in terms of elevating social development indicators. If we look at the Lunch Schemes,, first undertaken in Tamil Nadu in 1956 under Kamaraj as well as the Employment Guarantee Schemes in Maharashtra, which started as early as 1972, they are examples of schemes which ultimately the Union Government has approved and encouraged. The education system and reforms in Delhi and Himachal Pradesh have also been internationally remarked upon in that they treat education as a necessity and not a luxury, as evidenced by its prominence in the budget, 25%—something unprecedented.[6] In cases such as the Midday Meal Scheme, there were many unintended consequences, such as the increase in school attendance, and with nutrition, better child health, leading to a dramatic decline in the states' birth rate as the infant mortality rates got reduced, causing parents to choose to have less children. These benefits indubitably outweighed the costs involved.

The matter of 'freebies' has also been raised as a flagrant example of the serious unwisdom of the states' priorities. Self-serving examples are given of privileging Punjab farmers with free water and electricity as a prime and egregious example of a blatant policy delinquency. However, this disparagement does not extend to incentives offered by the Union Government to industrialists in terms of Production Linked Incentives (PLIs). There is also discrimination in nomenclature, between subsidies that are irredeemably bad and incentives, such as PLIs, which are good.

It is not evident that the PLI schemes, despite the *braggadocio* which attends the announcements or even the alleged outcomes, are really sensible for a Government with scarce resources and many claims on it to undertake. The Prime Minister announces with aplomb that India is now a net exporter of mobile phones when previously, before the PLI Scheme, it was a net importer, this being in 2023. What is omitted, one suspects by design, is that India has actually emerged as a centre for the assembly of such instruments, not manufacture. So, there is an import cost of the parts of the instrument to be assembled as well as a subsidy payable by the Government. Similarly, in relation to a semi-conductor plant in Gujarat which is to generate 5,000 jobs, the subsidy may amount to INR 3.2 crores per job, an unconscionably expensive way of subsidising jobs.[7] There is major opacity when it comes to data, so it is not even evident that the subsidy is less than the value added by this whole exercise, reducing this to a mere branding optic.

These incentives have to be compounded with huge write-offs by public sector banks of loans to corporate houses which have turned bad—as of 2024, the public sector banks and scheduled commercial banks wrote off loans worth Rs.16.35 lakh crores in the last ten years, according to RBI data.[8] These kinds of write-offs belie the narrative of a Government preventing corruption and crony capitalism in the banking system.

This attack on alleged freebies must be seen as part of a concerted policy by the Centre to cripple state governments in being able to address local needs. At the time of writing, Kerala, for example, has been faring badly in terms of its finances, being a state actively seeking to provide social welfare policies in terms of health and education for its populations, as opposed to states which are ostensibly fiscally prudent but whose social indicators are dire.

This is a likely prelude to a much greater emphasis on Centrally Funded Sponsored Schemes (CSS). The statistics bear this out, as the Union Budget estimate for the CSS in the year 2021-2022 was in the region of INR 3.8 lakh crores. To put this in perspective, the Finance Commission transfers—including grants to states—hardly amount to INR 2.2 lakh crores. The Constitutional stratagem the Union Government uses is to treat these grants as falling under Article

282 of the Constitution, which provides a basis for miscellaneous transfers. In this way, the Union Government effects a back door entry, acquiring the power of control through such conditional grants in spheres it cannot otherwise operate. Swatch Bharat Abhiyan is an example of such a scheme as the matter of sanitation falls exclusively under the State List. As Mihir Sharma states,

> All 'centrally sponsored schemes' were and are an assault on Constitutional federal principles. Unsurprisingly, state governments resent the schemes, which are not designed in state capitals with their needs in mind—and, in some cases, are presented as gifts from the political leadership at the Centre, even when the administrative resources used for their implementation belong to the state government.[9]

This centralisation is profoundly unfortunate, as it conflicts with a strong undercurrent in contemporary economic thinking that argues for the efficacy of place-based and place-specific policies, with economic policy being built in local identities, loyalties and capabilities.

There are two further examples of this aggrandisement of power which have attracted relatively little attention, but have far-reaching ramifications. The first of these are ports, and the second is electricity. The Union Government, anxious to burnish its image with international bankers, has been in privatisation mode, and one significant area for this policy are ports. It is not a coincidence that one of the largest private operators of ports in India is the Adani group, whose rise is closely associated with the Prime Minister. The Major Ports Authorities Acts, 2021 was passed and attempts to dramatically change the management model of ports. The oblique agenda is to prepare a blueprint for their privatisation, and one of the objections made in Parliament was that such a law would "provide the back door entry to crony capitalists in our ports."[10]

The other serious transgression on the Concurrent List is the Electricity Amendment Bill which has provoked reactions among many state governments. This Legislation introduces the concept of the Distribution Company. Its effects are incisively summarised by M.K. Stalin who stated that,

> the state will give in unbridled access to private place to supply the powers to select consumers and enable them to use the already laid out distribution network of the public sector companies whilst the states PSUs carry the burden of investment of such network these private companies are being allowed to use the same without any investment or any responsibility to maintain.[11]

He goes on further to say that this bonanza will allow companies "to cherry pick profitable venture without any social obligation." Given that electricity is an essential service, this reform cripples the public sector in an attempt to cross-subsidise between lucrative areas and rural areas, and condemns them to penury, denying them the opportunity to invest in infrastructure and fund maintenance.

*Inter-State Transfers*

The priorities of the Union Government have an impact on the inequalities between states which have only increased since the liberalisation of the economy in the 1990s. Finance Commissions were tasked with the role of resource transfers, and from the beginning there was the hope that this mechanism was to be instrumental in redressing regional imbalances. Even in the 1980s with the full panoply of the Planning Commission and a semi-command economy, this policy of redistributive transfers had signally failed, largely frustrated by richer states and the entrenchment of regressive values in the poorer states. According to Paul Brass, "the more advanced states have tended to receive higher per capital tax devolution than the less advanced states,"[12] the result being that tax devolution may have accentuated the disparities between the states. These policies have uniformly failed, as Martin Wolf castigates measures which "need the transfer of resources to poorer regions from richer ones. With that is likely to come the dead hand of central control."[13]

There was always a gap between what we call the cow belt states and the coastal states, but this process has been accentuated. If we take the benchmark as 2014, the difference between the average person in the three richest states—Kerala, Tamil Nadu and Maharashtra—

was that they were three times richer than the poorer states: Bihar, UP and Madhya Pradesh. There is an obvious asymmetry in terms of contribution and disbursal between Tamil Nadu and Bihar according to Mihir Sharma. The differential in a per-head disbursement is INR 3,000, which is not a huge amount but is significant and widening. Given the deteriorating conditions in the cow belt, what we see is a migration of labour and capital from the northern states to the southern states as subsidies flow the other way.

It becomes a source of controversy when the southern states see that the cow belt states show no appetite to adopt sensible policies like spending more on public goods, improving gender inequalities, women's health, etc., despite being subsidised in the manner that they are. As Thomas Isaac, the Kerala Finance Minister, put it, "We are not against redistribution. All we are asking is what is the outcome of decades of redistribution? Hindi-heartland states continue to remain underdeveloped, both socially and economically."[14] In fact, in the case of Kerala, the financial crisis of the state was exacerbated particularly when the Centre reduced Kerala's borrowing limit, constrained it to drag the Union Government to the Supreme Court for limiting its borrowing powers. The Supreme Court refused any interim relief, but the matter is to go before a Constitutional Bench.

If we look at the growth of the per capita domestic product of the state as of 2021, the disparities are only widening. UP, under Yogi Adityanath, has clocked an abysmal 0.4% for the last 4 years of his stewardship from 2017–2021. Admittedly, in the last several years, UP's economic performance has improved, but that cannot be detached from the Union Governments largesse to UP, including massive infrastructure spending. Yet even in 2022 his performance was being hailed by the Union Government as one would that of a messiah of growth and development. In contrast, if one looks to Telangana, the per capita state domestic product increased by 26.4% in four years. Tamil Nadu jumped by 22.2%, and Karnataka and Andhra Pradesh clocked a respectable 15%. The only bright spot in the cow belt is Bihar which has shown an impressive 21.8% growth over the last 4 years, although on a pathetically low base.

In this context, the greater signification afforded to population which is apparent in the ToR of the 15th Finance Commission is

important, as states which have brought their TFR under control to European levels feel discriminated against when states like UP and Bihar whose TFR rates are substantially higher are rewarded for their failure to enforce family planning. This is central to the discussion, as a growing population does not just signify a failure of governance—it reifies existing social indicators like female illiteracy levels, with Bihar having 26.8% and Kerala 7%. A demographic divide morphs into a cultural chasm, further accentuated by a linguistic divide, more particularly when the Hindi-speaking states want to provocatively assert their hegemony on the plea of national integration, in particular forcing Hindi to become the national language, a spectre likely to snowball post delimitation.

The matter of language and the prospect of imposition of Hindi on non-Hindi speaking states has recently resurfaced after the 1960s. The original sunset clause, whereby English could be used as the official language of communication for a temporary period of fifteen years under Article 345 of the Constitution, was coming to an end, and the southern states, particularly Tamil Nadu, were opposed to the imposition of Hindi. This led to the amendment of the Official Languages Act in 1967 which allowed for the continuance of English in official communication and that all official documentation would be published both in Hindi and English. An attempt was made in the draft National Education Policy in 2020 to promote Hindi, but this was removed after protest.

These fissures were just about tolerable in the national imagination when the Union Government was seen as disinterested and fair, but once the venom of politics seeps into the equation, one has a heady and toxic mixture which is ripe for causing future political turbulence. As Mihir Sharma argues, this scenario "goes to the heart of a central political fault line in India today, one that spans the social and economic spheres." He argues that:

> New population numbers may mean that these states' share of seats in Parliament will decline leaving them with little voice in New Delhi's decisions. Inter-regional transfers in India, already high, will increase. One state finance minister has complained

> that sending local taxes north is "like throwing money down the well."[15]

It is thus apparent that the more prosperous and advanced states deeply resent inter-state transfers to states that show no inclination to undertake any serious social reforms and generate quality public goods. This schism acquires a sharp political edge when it is apparent that the Union Government does not need the southern states to continue to remain in power; it needs only the support of the cow belt states. The saying that 'the road to Delhi goes through Lucknow' has acquired greater resonance now than ever before. With the spectre of delimitation, there is the very real presentiment of enhancing the political heft of the cow belt states, and the creation of a new aggrieved minority, the South. This delimitation will only serve to exacerbate the growing fissures in a seriously frayed federal compact.

One of the essential features of the federal compact is that there is complete freedom to work in any part of India, a freedom which is enshrined in Article 19(1)(g) of the Constitution and which is being impugned. Such freedom is not readily available in other countries, such as China, where workers cannot go from state to state in search of work. It was this free movement of labour which was considered to be one of the catalysts leading to Brexit in the United Kingdom, as it was a non-negotiable principle of the European Union.

With growing economic disparities between the rich and the poor states, inevitably there is inter-state migration. This has political consequences, causing certain states, as populist measures, to reserve jobs, for locals and make a distinction between local domiciles and persons from other states. This distinction is constitutionally unwarranted as it seeks to make a distinction between Indians, repudiating the freedom of movement and work. It also seeks to reserve jobs not on the basis of being a backward or a Scheduled Caste but on the basis of domicile. In Haryana, the state government has purported to reserve 75% of jobs in the private sector for locals. Admittedly, the act applies to jobs with a salary level of up to INR 30,000 per month. The Haryana legislation stands out because it applies not to the public sector but to the private sector. It was

challenged in the High Court but stayed by the Apex Court, which set aside the High Court Order.[16] Karnataka has also embarked on this policy. This is emblematic of an all too pervasive parochial mindset which undermines the very idea of India.

These incipient restrictions on internal migration are both unprecedented and extraordinary and do not seem to have attracted the attention they ought to. They augur turbulence, as future decades are going to see diminishing water resources in the North and West of India, adversely affecting states like Rajasthan, Gujarat, Punjab, Haryana and UP. This portends to be a future flashpoint in Indian politics, as diminishing access to water will devastate agriculture and employment in these states and possibly lead to mass migration. This will accentuate the North-South divide.

*Encroachment on the Divisible Pool*

If the states are squeezed financially by having to implement CCS originating from the Union Government at their cost, there is a further source of angst and grievance: the increasingly routine and liberal recourse to cesses and surcharges by the Union Government from the divisible pool which is part of gross tax revenue, distributed between the Centre and the states. The Constitution under Article 270 provided the Union Government with the power to levy cesses in the event of extraordinary contingencies, such as war or natural calamities, but such cesses have now acquired a permanent basis, reducing the freedom of states to spend from the divisible pool, with the Union Government keeping the cess revenues to itself. What is improper is that cesses are mandated to be spent on a specific purpose, but they are not. Since 2014, the Comptroller and Auditor General of India (CAG) has noted that only a percentage of cesses raised have been spent on their purpose; there is complete opaqueness on the balance. Muralidharan argues that to strengthen the fiscal compact there is traction in linking revenue streams to specific uses, such as petroleum taxes to public transportation.[17] However, given the opacity of government finances, this gets lost.

It is also true that up to 2024, the Modi Government had increased the number of cesses by 153%. In 2011, the share of the gross tax

revenues of cesses and surcharges stood at 10.4%, now estimated at 18.4% of gross tax revenues from 2021–22 to 2025–26. In 2021, the share of the states in the divisible pool had fallen to as low as 26% from 32% in 2014.

There are also serious issues with the Goods and Services Tax (GST) as a tax; it was proclaimed as one of the greatest fiscal reforms in independent India, but what it attempts to do is to create a single market through the perverse conceit of shifting taxation from the industrialised clusters to the consumption areas. This policy only succeeds in reifying the status quo in terms of where industry is based, such as states like Tamil Nadu and Maharashtra, as they are efficient at what they do. This works against states like UP which have a fledgling industrial base but desperately need to shift their rural workforce into industry and manufacturing. It also has serious ramifications on manufacturing states as they are denied taxing powers and revenues on the items they manufacture, as that now resides in the place of consumption. The GST has further crippled the ability of the states to raise taxes, as their indirect tax rights are emasculated, save for petroleum products, alcohol and electricity, as now GST serves the paradigm of a uniform tax system. This particular tax has been trumpeted as *One Nation One Tax*, as if it were the normative position worldwide. But as Nilakantan R.S. observes, it is noteworthy that the only other two federal structures that are similar to India in terms of their size—the USA and China—do not have a GST or anything like it.[18] This is a question to ponder.

Thus, through financial legerdemain, the Centre has encroached on the states' capacity to fund their current expenditures. This decline is from the acme in 1955–56 of 69% to less than 38% in 2019–20. Needless to say, the demands on the states have been increasing disproportionately to the growth in revenue which has been largely static. India has a low direct tax base, relying on the most sensationally regressive indirect taxation system in the world; nearly 56% of the total tax revenue comes from indirect taxation which is inherently regressive. In recent years, there has been a huge windfall in terms of taxation on petroleum products, heavily skewed in favour of the Union Government.

It is also relevant that the Union places constraints on the states' capacity to raise monies (INR 5.8 trillion in 2024), imposing a differential interest for market borrowings which is currently 10% for states against the 7% that the Union enjoys. This is wholly discriminatory, as it cripples the states' capacity to raise monies for items on its list. This asymmetry is particularly evident when the states are assigned 60% of the total expenditure and the Union is obligated with the balance of 40%.

When certain commentators[19] argue that the CCS trend had started much before 2014, and that to blame the present Government for its initiatives is unfair, no mention is made of the role of the Planning Commission which was dissolved in 2015. The Planning Commission played a critical role as a consultative body for state governments in the formulation of public policy, a role that the NITI Aayog has thus far not emulated. Also, it generated much reliable data essential to determining whether policy goals have been met. The states are dependent on what the government chooses to disclose.

In the absence of developing state capacities for handling critical matters such as education and health, there has been a greater emphasis on cash transfers to poor beneficiaries in recent years, spurred by the momentum of the creation of digital bank accounts known as '*Jan Dhan*' accounts which are one of the cynosures of the Modi Government. Rathin Roy comments on the Unified Payments Interface (UPI) being projected as a spur to growth when all it was intended to do was to direct doles to the right recipients and make it apparent that this was coming from the Prime Minister.

Unfortunately, this is not a substitute for developing and investing in public services, which only the states and municipalities can do efficaciously. Without this, there are serious implications for public policy that are not fully appreciated. As Niraja Gopal Jayal tellingly puts it, "In general, the expectation that cash transfers will replace public services by sending people off, coins jingling in their pockets, to shop for food, health, and education on the market is tantamount to shrugging off public responsibility because it is administratively cumbersome."[20] Politically, it is also not rewarding in as much as it is not tangible like a toilet or a road; transforming an educational system is not obvious to the average voter and takes time. So, public

goods, such as health and education, get low priority because of intrinsic difficulties in delivery and long-term returns which do not guarantee success at elections and, perhaps, a desire to keep populations ignorant.

In India, education was traditionally a state subject, and it was inserted in the Concurrent List as part of the 42nd Amendment Act of 1976. Thereafter, every Union Government has been anxious to centralise education, and this has been remarked upon by Nilakantan R.S., who states that "the three-language formula for schools is an example of India's centralising thrust."[21] There is, of course, an implicit desire to promote Hindi and Sanskrit at the cost of English. This policy is wholly political in intent and bears no relationship to education. It is prudent to argue that education is best addressed at state levels, given the huge divergence in performance between states. However, the present Government, having unveiled the National Educational Policy in 2020, is intent on putting in place a single policy for all of India, irrespective of the chasms that exist between what is termed as GER (Gross Enrolment Ratio) among states, particularly as one progresses from secondary to higher secondary levels. For example, the GER for UP in 2016–2017 was 68, for Kerala it was 99, for Tamil Nadu it was 94 and for Maharashtra it was 92.

It is also relevant to point out that with the 2024 debacle of the 'One State One Examination' fiasco, the question of centralisation of education becomes even more controversial and discredited. The NEET exams conducted in 2024 led to anomalous results, with many students pointing to irregularities in the marking of papers, hinting obliquely at corruption and leading to the alienation of more than three million students. This has not helped the cause of centralisation of education.

Not content with the NEET debacle, the Union Government has pushed through UGC Regulations 2025 in which they appropriate the power to appoint Vice Chancellors in state universities. This has been criticised for devaluing the autonomy of universities as well as infringing on the principle of Federalism. There is clearly an ideological angle at play, and one which will only diminish tertiary education.

No modern society has been able to develop into a middle-income country without substantial spending on human development, which includes education and health, child nutrition and the advancement of women. India spends barely 1.6% on health and 3.9% on education, and these percentages have been decreasing in the last several years and are not seen as a political issue. Amartya Sen and Jean Dreze have long argued that India's record by all measures of human development has been abysmal, particularly in the post-liberalisation years, causing a great and growing chasm between the rich and the poor. These arguments have been buttressed by the work of Thomas Piketty in his magnum opus *Capital in the Twenty-First Century*[22] where he highlights the growing concentration of wealth amongst the 0.001% of Indians.

The matter of inequality in India, particularly since the impact of Covid, is one which many economists have difficulty addressing. According to the World Inequality Lab, the gap between the top 1% of the population and the rest has widened dramatically; the top 1% of the country received 23% of the annual national income and owns 40% of the national wealth. It points out that India boasts 271 US dollar billionaires, with a further 94 being added in 2023. This is happening at a time when the latest unemployment report published by the ILO shows a dismal picture of youth unemployment, with even the famed IIT graduates not getting jobs.[23] These eye watering disparities in both income and wealth have hugely impacted levels of inequality and opportunities, causing low levels of social mobility across generations. It also adversely affects economic growth as the middle classes get immiserated, causing a slump in effective demand and a consequent drying up in investment as there is no catalyst to propel the virtuous cycle of growth and investment. Placing India as liable to fall into the middle-income trap that other BRICS countries like Brazil find themselves in.

It is pertinent to note that the Hindu Right get most intemperate and agitated on the matter of the failure to implement Directive Principles when it comes to the UCC and cow slaughter (Articles 44 & 48 respectively) but do not evince the same passion when it comes to Article 39(c), which stipulates that "the economic system should not lead to concentration of wealth to the common detriment."

Article 38(2) mandates the state "to eliminate inequalities in status, facilities and opportunities among groups of people residing in different areas." These also are Directive Principles but manifestly play no role in policymaking and are not even raised in public discourse.

It is not a coincidence that the cow belt states are largely agricultural and their populations are engaged in subsistence farming. In fact, what is disturbing is a gradual increase in people working in agriculture—almost 60%, when agriculture only constitutes 16% of GDP in 2024. It has become a cliché that to spur economic growth and reduce inequalities, the solution lies in reform of the farming sector, the intent being to move people from low-income occupations into high-paying urban jobs. Making farming efficient is only one part of the problem. The other part, educating the workforce to enable it to be economically productive, is disregarded. It is here that education and skills play a central role to enable people to move up the value chain. We may have missed the boat as many low skilled jobs are being rendered obsolete by AI and robotics. Unfortunately, other than ubiquitous investment jamborees, there seems to be no real political agenda in the cow belt to break the employment impasse.

If we look at the data, the states that have the least proportion of rural households are the most prosperous, such as Tamil Nadu (which has 35%) compared to UP (which has 75%), one of the poorest states. Kerala has 27% of its households engaged in agriculture compared to Madhya Pradesh which has 71%. Even more striking is the urbanisation of the states which are not so dependent on agriculture—in Tamil Nadu it is 48% compared to UP which is 22%.[24]

These matters require major investments in public goods, such as education, health, clean water, clean air and a functioning judiciary, areas in which the states are integral to the successful implementation of these projects, as well as the need to increase the participation of women in the workforce. For example, the Centre for Monitoring the Indian Economy (CMIE) statistics shows that the Female Labour Participation rate (FLPR) stood at 8.8.% in June 2023 in India, whilst in Bangladesh this participation rate was 36.668% in 2023 (CEIC Data), a shocking discrepancy.[25] Even Afghanistan, prior to the Taliban takeover, had a larger proportion of women in

their workforce than India.[26] This discrepancy has great economic resonance, as the empowerment of women is not a mere slogan but has been shown to yield substantial economic gains if implemented. In a study called the *Power of Parity*, McKinsey captured the huge economic gains countries stand to achieve through extending the power of women in the economy, citing a possible surge in the GDP by as much as 5–20%.[27] In this, Swati Narayan has demonstrated that India's poorer neighbours, such as Nepal and Bangladesh, have overtaken India in social indicators—excluding states like Kerala and Tamil Nadu—in literacy, life expectancy, nutrition and gender equality.[28] Nepal has a larger GDP than UP and Bihar combined.

In a new and searing indictment of post-Independence economic policies by the Princeton Economist, Ashoka Mody, he has argued that:

The bogeyman of the alleged socialist legacy has given India's market-friendly 'liberalisers' license to pursue an economic path that generates ever more inequality while continuing the neglect of public goods necessary for shared progress. Leaders and public intellectuals—irrespective of their rhetoric and professed ideologies—have always paid only lip service to public goods. Particularly worrisome, they have pursued a mythical 'development' that causes possibly irreparable damage to the environment, a public good essential for current and future generations of Indians.[29]

This latter observation is directed against the reframing of the term 'development' to refer only to the construction of physical infrastructure.

It has been widely suggested that there is an almost umbilical link to the growing inequality in society demonstrated by the epic growth in corporate profits—an increase from around 50% of the top 20 companies in 2011 to 70% in the fiscal year 2020—as owing to the centralisation of politics and business. As Neelanjan Sircar concludes, this "consolidation requires the centralisation of political appeal. In order to achieve this outcome, the ruling BJP must mobilise significant political resources in deploying media resources and funding political machinery."[30] Thus, the growth of an oligarchic kleptocracy poses threats to democracy, market capitalism and society at large, and this is reflected in the growth

of US dollar billionaires, a phenomenon predicted by Aristotle over two millennia ago.[31]

Martin Wolf has commented on this development, stating:

> It is a great failing to encourage the emergence of a rigged capitalism, which destroys the legitimacy of the market economy and of the state that protects and promotes it. It is a great failing, above all, to cement power by creating a Pluto-populist coalition based on self-seeking at the top and rage at the middle and bottom. It is all too easy to motivate people by hatred and fear and so by a tribalism that divides the world into the 'good people' like us, and everybody else. But as society becomes more plutocratic, the sinews that bind citizens together snap.[32]

This is an important observation as to the direction India is going in.

*Federalism and a Presidential System*

India is witnessing the greatest centralisation of Government powers than at any other time in our history. It is for this reason that talk of a Presidential system has come into vogue.[33] It is proclaimed that this is the panacea for all our problems and aligns with a latent preference for authoritarianism in much of Indian middle-class thinking and mindset. It has been pointed out in a 2017 Pew Research Poll that even more than the Russians or Turks, Indians are seduced by the strong man syndrome, the poll finding that as many as 55% would seek this paradigm. Even more remarkable is that 65% would opt for military rule.

The BJP have long spoken of ushering in a Presidential system, but not in the way that a Presidential system is normally understood. As Sudheendra Kulkarni put it in relation to the kind of democracy which is envisaged, "Mr. Modi.... wants to convert our system into a kind of Presidential system where it is him versus all others."[34] In nations which have a Presidential system, such as the United States and Brazil, there is a strong Upper House, for example the Senate. In the US, the Senate does not just have a different pattern of representation, making it distinct from the Lower House, but provides space for equal say to the states, a stratagem to maintain

necessary checks and balances. When the matter of a Presidential system is raised in India, it is posited solely as a substitute for the current Westminster-like system of representation, in which electorates vote for a party and not for an individual. It assumes that this Presidential system would be superimposed on the existing model with a directionless and effete Upper House in the form of the present Rajya Sabha that offers no proper representation to the states at all. To compound this is a promiscuous Supreme Court, which, with few exceptions, operates in the shadow of the Executive and tries to avoid conflict, even at the cost of sacrificing Constitutional principles. In effect, there are no guardrails against a dictatorship.

This model gives cause for great trepidation as does the preliminary suggestion that both National and State elections should be held simultaneously, which initially appears innocuous and is justified by reference to reducing the cost of elections and their disruptive effect on day-to-day governance. This policy has been supported by a high-level committee headed by the former President, Ram Nath Kovind, which produced its reports on 14 March 2024. This argument must be understood as a precursor to the Presidential model with the oblique purpose of denying the Indian electorate an effective choice between voting separately for different parties in National elections and State elections. The intent is to belittle state level issues which would inevitably become subsumed in the national narrative, rendering state-level politics and regional parties which thrive on them irrelevant and marginal to the political discourse. It is true that these simultaneous elections were the norm until 1971. However, since then, the momentum of Federalism has thrown up a number of regional parties, and as Yamini Aiyer put it, "these Parties have been far more effective in responding to regional and ethnic identity assertions and their presence in national politics is linked to their ability to negotiate regional claims on the national stage."[35]

More practically, there is a concern of how practical such a stratagem would be, as when a government loses the confidence of the house, if you are going to impose the straitjacket of fixed terms, you are inviting the phenomenon of horse trading and more corruption. The United Kingdom experimented with this fixed term idea, and after a few years discarded it as being impractical.

The way politics has developed post 2014 is with the centralisation of power in the hands of the Prime Minister and Home Minister who regularly and routinely change Chief Ministers if there is even the possibility that they may be faced with an anti-incumbency matter in fresh elections or display any hint of a spine. This cavalier approach to Union and State relations, albeit intra-party, is symptomatic of a wider malaise that the state parties have become creatures of the national party, without any autonomy and subject to the caprice of the Central leadership, last seen in the bad old days of the Congress when the term 'the High Command' had resonance. The BJP Government does not, in its actions *qua* state governments of its own party, act any different.

### *Federalism and Political Parties*

Political parties are seminal to democracy, and such parties represent communities and ideologies that allow the political process to become the marketplace of ideas, not dissimilar to an economic marketplace. However, despite this perceived centrality, the notion of a 'political party' is itself a surprisingly extra-legal activity. The only statutory recognition of political parties is Section 29A (5) of the Representation of Peoples Act, 1951 which stipulates that a political party shall bear true faith and allegiance to the Constitution of India. What is bizarre is that despite having one of the most compendious Constitutions in the world which seeks to deal with everything within its purview, including the formation and running of the cooperative societies, the Constitution does not appear to recognise political parties as entities required to adhere to any set of rules. There are over 2,500 registered political parties, and to form one is relatively easy.

With the increasing feudalisation of political parties without the accompanied civilities and protocols as to succession, a central feature of democracy is lost. The centrality of inner party democracy at the state level is critical to how the party develops, is supported, funded and formulates its agenda which goes into the making of its manifesto. Without this inner party democracy, it is difficult to see how politics can serve any useful purpose in a democracy other than

being a validation or command performance for a personality cult, which it is ineluctably becoming.

One of the values of political parties at the grassroots level was in the area of welfare delivery, the inevitable patronage networks that attempt the distribution of benefits which in turn gave *kudos* to party members and gave them prominence within the community. With direct transfers into bank accounts under the UPI system to beneficiaries with *jandhan* accounts under various schemes exclusively associated with the Prime Minister is one indubitably intended to burnish his own personality cult. Local party members have been reduced to acting as marketing agents for such schemes without any visible agency within their community. It also has huge ramifications for the federal structure, as it diminishes the role of the party and grassroots politicians in several critical ways which are intertwined. Leakages and corruption may have been attenuated but at the cost of the creation of an architecture of a centralised oligarchic kleptocracy which has seized the political and economic narrative.

### *Party Funding and Federal Encroachment*

To buttress a powerful regional constituency, local funding to parties is required. Financial restrictions which otherwise shackle the NGO sector such as controls on foreign and corporate funding have been eased on political parties. It was under Rajiv Gandhi that companies were allowed to fund political parties, so raising white monies had become much easier. Monies received by political parties are also exempt from income tax. As Devangshu Datta pointedly puts it, "so in India circa 2022, the ease of doing business is moot. The ease of doing charity is non-existent but the ease of doing politics is good as it could get and setting up a party is the smoothest route for money laundering."[36]

Yet, whilst political parties are critical to the functioning of democracy, there are no proper regulations as to their finances and, indeed, no proper stipulations as to what they can do or who they can represent, as many have openly aligned with caste or religious

formations. There is a compelling argument to bring political parties within the Constitutional framework, if they are to function properly.

The importance of raising monies is critical to maintaining local autonomy, and it is the changing nature of electoral funding which is undermining local and regional interests and assisting the centralisers. The costs of elections have been escalating over the last few years, and it was even stated that in the bitterly contested state elections in West Bengal in 2022, which resulted in a Trinamool Congress victory over the BJP, the budget for each constituency was estimated at not less than INR 200 crores per seat. Whether this is true or not is difficult to confirm, but with large constituencies, logistics, banners and other paraphernalia, there are other huge costs involved. Accordingly, it is difficult to see how the local BJP cadres could have raised these kinds of monies for elections, and it would have had to be funds sent from New Delhi. But it is relevant to note that the election expenditure involves not just the payment for electoral campaigns, but often post-electoral shenanigans, such as purchasing MLAs and horse trading. So, this compounds electoral costs which have spiralled sensationally, partly because of population growth; but also, as James Crabtree observed, with "other elements of a modern campaign: pollsters, political consultants, roadside posters, television adverts and Facebook posts. The result fused electoral techniques from the nineteenth and twenty-first centuries, and incurred the expense of both."[37]

This insidious process of centralisation of big corporate capital and election funding had been turbocharged by a very controversial but wickedly clever device known as the Electoral Bond Scheme. Electoral Bonds secured complete anonymity for the donor of inestimable value when the reward is access to control and management of strategic businesses without any accountability. This Scheme was controversial on many counts and has been successfully challenged in the Supreme Court, the Bench holding that anonymous Electoral Bonds are violative of the Right to Information under Article 19(1) (a) of the Constitution[38] but without any adverse consequences for the participants.

In this context, the encroachment on such promising and lush areas, virgin forests, mineral concession rights, etc., which may lead

to the encashment of economic rents and the capacity to assist their corporate friends and donors, is too tempting a prospect to ignore for a Union Government obsessed with aggrandisement of power and limitless funding for elections. Centralised funding by a few trusted corporates through encroachment on the State List further attenuates the autonomy of state governments as they become reliant on the party at the Centre to fund elections. This signals the return of 'the High Command' brand of politics backed and sustained by oligarch kleptocrats which diminishes the federal impulse.

The standard argument of the Right is that it is not new to India. The Congress Party fostered powerful relationships with industrial houses such as the Birlas and the Bajajs from the days of the Independence struggle. Dhirubhai Ambani, the founder of Reliance, was close to Indira Gandhi and Pranab Mukherjee, and much of his stellar rise owes itself to tweaks in policy to favour his businesses. But the larger issue is that today the private sector is involved in businesses which have strategic importance such as ports, electricity, oil, gas, these goods and services were formerly in the public sector. Most of these behemoths are closely held, leading to a sensational growth in the wealth of certain families.

Given the fact that India's competition and anti-trust laws are at a fledgling stage and are considered to be largely ineffectual, particularly for domestic companies surcharged by huge economic disparities and a contracting middle class, these factors do not bode well for society at large.

The oligarch argument has been surcharged by the observations of a former Reserve Bank Deputy Governor, Viral Acharya, who has identified the Big Five—Reliance, Tata, Aditya Birla, Adani and Bharti Telecom—which he argues are growing at the expense of the small businesses.[39] He argues that this exponential rise in industrial concentration of these behemoths has enabled these companies to charge higher product prices than their competitors, entrenching persistent core inflation. According to Rajrishi Singhal, the Indian anti-trust laws seem to recognise dominance only by a single entity, not collective dominance as an economic problem.[40] We return to Adam Smith who, in his *Wealth of Nations*, wrote that competition

favours 'equality, liberty and justice,' something sadly absent in our increasingly centralised and mercantilist economy.

Conservatives would view configurations of a new pact being confined to the putative Inter-State Council being revived—one of the recommendations of the Sarkaria Commission back in 1983—a panacea which depended much on the goodwill of the Union Government, which is in very short supply today. It is astonishing that since 1985, the Inter-State Council has only met on sixteen occasions: so much for the consultative paradigm.

It is not as if the Government is bereft of the paraphernalia to widen and enrich the discourse through devices such as white papers, select committees, even parliamentary debates, as well as consulting the states by presenting them with options and material for an informed discussion. P. Sainath alleges that it was the legal team of interested corporates such as Adani that drafted the Farm Bills which were passed by way of Ordinance, almost like a medieval fiat.[41] Whether this is true or not we cannot establish, but the whole process was undeniably opaque, and as such demonstrates no will or desire to engage in discussion. Even after the bloody nose the electorate inflicted upon the BJP in the 2024 elections, their mindset has not changed. At the time of writing, the NDA Government is bringing in major amendments to the criminal laws and justice system without any consultation with the states when admittedly law and order is a state subject.

What is to be done? Perhaps we need to deconstruct our Constitutional arrangements to serve the greater cause of Federalism, to create new centres of power which would involve much greater devolution. The 'parchment barriers' of the Constitution would be respected only because, in the famous words of Madison, "ambition must be made to counteract ambition."[42]

A consultative paradigm is at odds with a political trajectory which exercises a gravitational pull to the Centre, and one intractably stacked against the states. There was no level playing field to begin with, but the decimation of local politics, state parties, the corporatisation of the critical areas of land, labour and agriculture only serves to configure a new and ominous compact, that between the Union Government and its corporate backers and fundraisers.

In this new paradigm, the people count for little, except as voting fodder transfixed by the drumbeat of the new nationalism. This is undeniably the nature of this new kleptocratic Federalism, one which owes its provenance to the Constitutional arrangements arrived at post-Partition.

PART VII

# THE AFTERMATH OF PARTITION

## PAKISTAN, KASHMIR AND THE PLIGHT OF THE INDIAN MUSLIMS

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# THE AFTERMATH OF PARTITION

The Partition witnessed the migration of between 7,249,000 Hindus and Sikhs from Pakistan and a migration of 7,226,000 Muslims from India to Pakistan.[1] In Bengal, as far as the 1951 census, 700,000 Muslims migrated from India and 1.5 million Hindus migrated to India from East Pakistan.[2] It is important to realise that to focus solely on the Partition riots, as many commentators do, is to miss the full enormity of the tragedy, as it pointedly excludes the terrible massacres that occurred in the Princely States, such as the Jammu massacres, those that happened in Alwar as well as the pogrom unleashed by Sardar Patel in the Nizam territories, which went by the anodyne term '*police action*.' This wider conspectus gravely undermines this curated mythology of a seamless and peaceful transition of power from 1947 to 1950—if anything, it demonstrates how violent this period was and that, in some ways, was tantamount to a civil war. But was this violence a harbinger of the future of Partition?

Pratap Bhanu Mehta makes the point that the Partition of India could only work if three conditions were to obtain.[3] The first being that "internal conflicts in each of the states would not radically spill over into the other states." The fragile configuration of Pakistan post-Partition was always likely to create issues going to the very tenability of the State. This surfaced with a vengeance in 1971 with

the bloody creation of Bangladesh assisted by Indian intervention. There is also the matter of Jammu & Kashmir and border issues which remain unresolved. Secondly, that the successor States would attempt to behave in as normal and conventional a way as possible, encouraging trade and commerce. It is entirely possible that the two Punjabs would have made some kind of peace despite the carnage. There were ineffable cultural and economic ties that would have compelled the Punjabs to cooperate, but, unfortunately, owing to the Kashmir dispute, normal relations have not been possible. The third condition that Mehta points out is the seminal role of India. Because of its size and population, it was always to be the big brother in the equation, and in reaction to communalism elsewhere it was required to reaffirm its own secularism more deeply. But that has been wrecked by the "ascendency of Hindu nationalism… looks for pretexts to target Muslims, deepen internal divisions, and construct a seamless spectre of Muslim threat."[4]

This has led not just to aggravating already troubled relations between neighbours; even a state like Bangladesh, which sought to maintain normal relations with India, is deeply aggrieved at the anti-Muslim rhetoric of Indian politicians. This has been compounded by the toppling of the authoritarian Shaikh Hasina Government, a regime very much identified with the Government in Delhi. This has not only had the consequence of compromising Bangladesh's already stigmatised secularism but also has a malign domino effect throughout the sub-continent, encouraging fundamentalists of all hues to compete in expressing intolerant sentiments and making inflammatory speeches.

For the Indian State, it has been plagued with border troubles and now faces hostile forces on the west as well as the east. It also has a major military commitment in Kashmir to sustain, and through a policy of alienating its largest minority, it has stoked up problems for the future. Partition has also imposed a unitarian configuration on the Indian State which is now coming to haunt it and has given a supremacy to the cow belt states, particularly UP and Bihar, which has proved to be a force to propel reactionary conservatism and to vivify religion, bringing with that impoverishment. With the prospect of delimitation, even greater political heft will be given to

the northern states, which will foment serious issues with the south. The virulent nationalism that has taken hold is consuming Indian institutions and democracy.

For Pakistan, it has been an unmitigated disaster, reducing it to a garrison state through its own paranoia and a device to enrich the military. Bangladesh and its stellar economic development in the last few years has been a surprise, but its performance is only remarkable in the context of a sub-continent growing at sub-optimal levels and, despite 1971, there still lurks the malign forces of religious reaction.

What is missing in discussions of the consequences of Partition is the dismantling of the Indian army and its geo-political ramifications. This was the largest volunteer army in the world, numbering over 2.5 million men in August 1947. Whilst all the sycophants of Hindutva wax eloquent on Nehru's alleged blunders on Kashmir, when the reality was that it was unlikely to even be part of India but for Nehru, what they do not speak of is Tibet, annexed in 1950. China, in my view, would have been reluctant to disturb local equations and invade Tibet in 1950 if there was a serious deterrent in terms of a United Indian Army. A Partitioned Indian military was in no position to contest the Chinese invasion of Tibet in 1950.[5] India would never have had a border with China if Tibet had not been overrun and annexed by the Chinese. The rest, as they say, is history. This is not to exculpate Nehru but to point out that the Hindu Right are far from blameless in maintaining an adamantine stand on majoritarianism, hastening Partition and should bear blame for some of the consequences which haunt us to this day.

### *Pakistan*

The Partition led to the creation of Pakistan as a sovereign State with two wings, West and East. At that time, there were serious doubts as to whether it would survive as a country. It had 27% of the land space of undivided India, with 17.5% of its resources. It was divided with a thousand miles of India between its two wings, which had traditionally been the entry point for foreign invasions from Afghanistan and Central Asia in the West and, recently, Japan in the East. For Pakistan, this *denouement* made no sense at all, as the

Union of East and West Pakistan, as Anatol Lieven pointed out, was "dictated at first instance by the need to keep all Muslims together so as to form the largest possible block against the Hindus within an Indian Confederation."[6] Thereafter, he observes with acuity that "as a homeland to all Muslims of South Asia… that meant that enormous political and emotional capital was invested in trying to maintain Pakistan as one State—when two friendly allied states would have made more sense."[7] This epitomised Jinnah's lack of thinking through the reality of Pakistan as a nation-state and is characterised by his obtuse insistence on treating the Bengalis as inferiors without any agency, as evidenced by the diktat of Urdu being the language of Pakistan despite the Bengali speaking majority. It contradicted his position to argue for cultural pluralism in India, but insist on homogeneity in Pakistan.

The need, in the words of Levien, to "balance, conciliate or suppress"[8] the East Bengalis had a hugely detrimental influence on Pakistan's trajectory as a nation and contributed to stunting it as a democracy, as East Pakistan had a small majority which, in fair and free elections, would have resulted in the likely victory of a Bengali party, a prospect which the West Pakistanis would never countenance. This political configuration was plainly not tenable, but it was not too long before all political capital was expended and East Pakistan was restive, particularly after the 1965 election, where Fatima Jinnah was defeated by Ayub Khan in a rigged election which was sought to be legitimised by a disastrous and unnecessary conflict with India. Thereafter, the army came to establish successive dictatorships and became addicted to the elixir of power, something which continues to this day. This baleful influence had the unsettling effect of ratchetting up episodic tensions over Kashmir. As Salman Rushdie put it pithily, "the idea of Pakistan suffered from insufficient imagination."[9]

The onset of conflicts started at its very birth with the Jammu genocide and the entry of tribal irregulars into Kashmir in 1948, instigating Indian reaction to protect the Valley, Jammu and Ladakh. Pakistan also had to deal with a disputed border with Afghanistan and Pakhtun nationalism, and the need to avoid a two front war had compelled the Pakistani elite to forever blight the prospects of

a third country, Afghanistan, being instrumental to the rise of the Taliban. The Pakistani elite, from the very inception, feared India would seek to enforce what the RSS termed *'Akhand Bharat'* (greater India), as there was a strong constituency in India unwilling to accept the creation of Pakistan.

Sudipta Kaviraj, writing on the Partition as a territorial phenomenon, points out that "the most fundamental damage to political imagination was done perhaps by the idea underlying Partition that minorities can only secure themselves only in a state of their own, that is only if they turn themselves into a majority."[10] That is unfortunately the great takeaway of Partition, that people of different religions cannot live together and that the only way that societies can be formed and nations consolidated is by reference to an avowedly religious praxis.

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# KASHMIR

The main issue which seems to have galvanised both countries and vitiated the maintenance of any civil relationship between India and Pakistan as envisaged by both Gandhi and Jinnah has been the Kashmir dispute. It is vital to re-visit the history of Kashmir. The Kashmir Valley is 97% Muslim, and in the state, Muslims constitute 64% of the population. It was the last of the Princely States which acceded to India, although Pakistan disputes the validity of the accession. For demographic reasons it should have gone to Pakistan on the basis of it being a Muslim-majority province, a view held by Sardar Patel. The complication lay in the fact that the ruler of Kashmir, Maharaja Hari Singh, was a Dogra Hindu who wished for Kashmiri independence to retain his sovereignty, and to this end he kept playing off the Congress against the League, refusing to accede to either. Unfortunately for him, he left matters unresolved until the Poonch uprising which started in August 1947 and by September had become a full-blown revolt, resulting in communal violence on an epic scale. The Dogra army took the lead in committing atrocities and violence against Poonch Muslims. They were opposed by the self-proclaimed Azad army who sponsored tribal forces which had, in their words, already 'liberated' a substantial part of Mirpur and Poonch from Dogra rule by that time. As Chitralekha Zutshi put it,

"it was the insurrection against Dogra rule rather than the incursion of the Pukhtoon tribesmen that set the stage for the division of the state."[1] This revisionism identified with Christopher Sneddon, who traces the tribal rising as a reaction to the pogrom in Jammu, greatly changes the narrative in which we see the genesis of the Kashmir dispute.[2]

The Maharaja was constrained to seek Nehru's help. Nehru took the decision to intervene militarily and forced the tribesmen back and did so with a massive airlift of soldiers and equipment from Delhi in October 1947 in exchange for Hari Singh agreeing to sign an Instrument of Accession to India. There are all manner of academic debates over the validity of the instrument, which I do not wish to go into, save to say it was not uncontroversial.

Mountbatten had to validate the Accession Treaty in his capacity as Governor General, and he did so with the qualification that such an accession should be ratified in accordance "with the wishes of the people of the State."[3] This was the genesis for the talk of the controversial plebiscite of the people of Kashmir. Nehru accepted this condition, as this was the protocol adopted in Junagadh and the Northwest Frontier province. In Junagadh, there was a Muslim ruler who ruled over a largely Hindu population that acceded to Pakistan. In that case, the instrument of accession was rescinded, and a plebiscite was agreed by Pakistan. In fact, Sardar Patel in Junagadh made a speech that "The State is no property of a single individual. Paramountcy has lapsed—certainly not by the efforts of the Princes, but by those of the people."[4] These words would have equal resonance in relation to Kashmir. In any case, Nehru was close to the preeminent political leader of Kashmir, Sheikh Abdullah, who was confident of getting support of the Kashmiris. Abdullah was a charismatic leader, the son of a shawl trader who was imprisoned in 1946 for leading a popular movement against Maharaja Hari Singh. Further, if Mountbatten did not approve the accession as Governor General, then there would have been no accession, as the approval was conditional. Given the precedent of Junagadh, there was not much Nehru could have done.

There is, of course, the question of who Kashmir was to go to, as, on the basis of its population being largely Muslim, it should have

gone to Pakistan. However, as it was a Princely State, different rules applied. The journalist Kuldip Nayyar wrote that:

> While it is true that Nehru was keen on Kashmir's accession to India, Patel opposed it. Shaikh Abdullah told me in an interview later (21 February 1971) that Patel argued with him that Kashmir was a Muslim-majority area it should go to Pakistan. Even when New Delhi received the Maharaja's request to accede to India, Patel said 'we should not get mixed up with Kashmir. We already have too much on our plate'.[5]

Whilst Patel was logically consistent, the Congress position had been plain in relation to the Princely States ruled by Muslim rulers but with Hindu majority populations, such as Junagadh and Hyderabad, but he had to contend with Nehru's emotional bonds with Kashmir. Patel records the fact that he tried his best to dissuade Nehru and that "Nehru had broken down and wept, explaining Kashmir meant more to him at that moment than anywhere else."[6] This concern was further recorded in a letter Nehru addressed to the Prime Minister of the state of Jammu & Kashmir, M.C. Mahajan in which he expresses his view on the future accession of the state, lamenting "for me it is both a personal and public matter. It would be a tragedy, so far as I am concerned, if Kashmir went to Pakistan."[7]

At the time of secession of hostilities, Pakistan exercised control over Gilgit, Baltistan, and a sliver of Kashmir, Poonch and Mirpur. India held Jammu, Ladakh a part of Poonch and the lion's share of the Valley, including the capital Srinagar. A ceasefire was signed on 1 January 1949. There was no serious equivalence between the territories; India had got the glittering prize of the Valley, and Pakistan was left with the mountains and largely uninhabitable regions, called PoK.

The Hindu Right have always excoriated Nehru for what they allege as his weakness in agreeing to a ceasefire and not proceeding to take PoK, and this accusation has acquired new resonance with the Modi Government abrogating Article 370. The argument is made that this compromise was, in the words of Amit Shah, "a Himalayan blunder, including agreeing to a plebiscite and going to the United Nations." In relation to the first accusation, contemporaneous

correspondence with the then Commander in Chief of the Indian Army, Sir Francis Robert Roy Bucher largely absolves Nehru, as he acted on the advice of his Army Chief. Bucher wrote on 28 November 1948 that there was fatigue on the part of the Indian troops in Kashmir and bluntly states that "overall military decision was no longer possible… army personnel evince two weaknesses, lack of training in the junior leaders, tiredness and ennui in the other ranks… In brief, the army needs respite for leave, training and vitalising."[8] Bucher himself suggested that a political approach to the problem was best. Conveniently, the Bucher papers have been embargoed by the NDA Government, but the Guardian newspaper was able to access some critical letters.[9]

As referred to earlier, Mountbatten had placed an important caveat on the instrument of accession, that it should be settled by reference to the people. According to Anuradha Bhasin, this did not make the accession 'permanent and irrevocable.' It had to be settled by a referendum which was principally agreed to by the Indian Government before and after the dispute went to the United Nations. Thus Bhasin concludes that it was on the basis of this conditional accession that Article 370 was included in the Indian Constitution by the Constituent Assembly.[10] Even the notion of a referendum was an instrument which had been earlier employed, in the case of Sylhet, part of Assam in British India—the question was whether this predominantly Bengali-speaking enclave should be part of India or Pakistan, and it agreed to go to Pakistan.[11] So, this protocol was not conjured as an instrument of Muslim appeasement. It had been spawned in Junagadh and was acted upon subsequently.

It is relevant that Article 370 was passed almost unanimously, save for one dissenter, Maulana Hasrat Mohani, a communist, who objected to the grant of the special status to Kashmir on the grounds that it discriminated against the other states of the Union which also deserved greater autonomy to realise the object of Federalism. Thus, contrary to the mythology, Article 370 was presented by Sardar Patel and seconded by Syama Prasad Mookerjee.

Furthermore, as Faizan Mustafa pointed out, "some critics of Article 370 have argued that Kashmir joined India in 1947 without any conditions, and Article 370 unnecessarily gave special status. However,

the drafting of the Constitution ended on the 26 November 1949—Article 370 had been included before the Constitution was adopted."[12] The fact was that Article 370 was conceived in Sardar Patel's house, he proposed it in the Lok Sabha, and statements to the contrary are designed to create a false binary between Patel and Nehru on this issue.

If there was any doubt about the likely outcome of the plebiscite in 1948, the fact that Pakistan refused to unconditionally withdraw its troops from the areas it was in occupation of, in accordance with the UN Council Resolution Number 47, is the best evidence that Pakistan itself never wanted a plebiscite at that time. In relation to the matter of taking the issue to the UN, this was explicitly supported by Sardar Patel.[13] In the absence of a plebiscite, the famous Article 370 was added to the Constitution in 1949 as a stop-gap measure pending the outcome of the plebiscite. Whilst the Pakistanis have a different view of why the plebiscite did not take place and blame Indian intransigence, the point which is missed is that the Kashmir Valley itself was changing by reason of the introduction of radical land reforms at the behest of Sheikh Abdullah in 1950, which were well received and widely popular. There is nothing to suggest that Kashmir would not have voted to stay with India in that period.

With the assassination of Liaquat Ali Khan in 1951, the gentlemanly protocols and civilities that marked inter-State relations between India and Pakistan diminished. In any event, the Pakistani elite went through a transformation. The League never had strong roots in the provinces which were to become Pakistan, and in the absence of a vibrant political class, and indeed civil society, one saw the rise of the bureaucrats, the army and careerist politicians from elite backgrounds, whose survival was contingent on army support. Zulfiqar Ali Bhutto was the prime example of such a politician who was the instigator of much that has gone wrong with Indo-Pak relations. One of his most dramatic gestures was playing a critical role in signing a border agreement with China in which he ceded over 2,000 square miles of the former state of Jammu & Kashmir to China, the area known as Aksai Chin. In this process, the Kashmir dispute became tripartite, something India has now belatedly realised after the abrogation of Article 370. The unwisdom of this abrogation surfaced in the Galwan valley barely ten months afterwards with

the brutal clubbing of 20 Indian soldiers by the People's Liberation Army (PLA) and the intrusion into what India had considered their territory in Ladakh. As Manoj Joshi explained, the creation of the Ladakh Union Territory so antagonised China that it attempted to raise the issue of Jammu & Kashmir as the India-Pakistan issue in the Security Council for the first time since 1971.[14] In fact, the Chinese spokesperson Wang Wenbin stated clearly that "China does not recognise the Ladakh Union Territory illegally set up in India and opposes infrastructure building aimed at military constructions in disputed border areas."[15] In fact, Article 370 abrogation has brought Ladakh to the Indo-China forefront, particularly when it was formally declared a Union Territory, attracting China's opprobrium.

There were talks in the 1950s between Nehru and Liaquat Ali Khan's successor, Mohammad Ali Bogra, which yielded nothing. What was also becoming irksome to Nehru was the attitude of his erstwhile ally, Sheikh Abdullah, whose support was crucial to securing the larger part of Jammu & Kashmir to India and to lend legitimacy to this exercise. Sheikh Abdullah was very much his own man and was confident enough to even suggest that independence was a feasible option for Kashmir. This suggestion provoked the displeasure of Nehru's Cabinet and persuaded the Congress to lock him up for nearly two decades. Zutshi ascribes this conduct to the desire to no longer seek a plebiscite as a consequence of the pro-Pakistani position the US had adopted, so a popular Chief Minister, such as Shaikh Abdulla was supremely dispensable. According to Zutshi, from 1953 to 1989, "A succession of quisling governments kept themselves in power through corruption, nepotism, and by stifling all voices of dissent and opposition."[16] This brute authoritarianism was epitomised by the introduction of the death penalty "for those suspected of pro-Pakistan leanings" under the aegis of Bakshi Ghulam Mohammad.[17]

Belatedly, Nehru woke up to the fact that alienating Pakistan made no sense, as it was driving the country into the arms of a resurgent and triumphalist China which had tasted military success in 1962 and, after the annexation of Tibet, boasted the longest international border with India. China and India were sharing a border for the first time, and China posed a very tangible military threat to India,

particularly as other border issues were not resolved. Nehru wanted to avoid a two-front war with Pakistan and China at all costs and accordingly held negotiations with Pakistan in 1963, sending Swaran Singh to negotiate with Bhutto on a resolution of Kashmir. Bhutto, as was his wont, scuttled the possibility of a settlement, although Ayub Khan in principle was in favour of it.

Nehru was at his wit's end and then thought out of the box. He played the Sheikh Abdullah card and released his old friend from jail to send him to Pakistan to negotiate with Ayub Khan and finalise a tentative agreement. But the Sheikh was what one could politely describe as a bit of a loose cannon and made the extraordinary suggestion of a confederation of the three entities: India, Pakistan and Kashmir. This solution was entirely self-serving but provoked the suspicion of the Pakistanis, who were forever paranoid about India's intentions. In any case, Nehru passed away in 1964 whilst Sheikh Abdullah was in Pakistan, and on his return he was arrested and imprisoned.

Ayub Khan blamed India's intransigence over Kashmir for the 1965 war which was a catastrophic attempt by Pakistan to wrest Kashmir by force, named 'Operation Gibraltar'. However, this war was actually triggered by domestic compulsions in Pakistani politics. Bhutto had successfully rigged the Presidential election between Ayub Khan and Fatima Jinnah, and he persuaded Khan about the need for a victory over India which would involve the taking of Kashmir to legitimise this constitutional perfidy. Ayub Khan had the support of China and was also conscious of the re-armament of the Indian Army post the Chinese debacle and saw this as the last window of opportunity to take on India before the re-armament process was complete. The war ended in a disaster, the Pakistanis narrowly escaped a complete defeat as Indian tanks were approaching Lahore and their supply lines were non-existent. Ayub Khan had wrongly assumed that the initial attack would not lead to an all-out war, and Bhutto had assured him that Indian troops would not cross the international border. The Pakistanis also banked on the revolt of the Kashmiris against India which did not happen.

At the same time as the Nagas were procuring arms from China in their revolt against India, the Kashmiris, despite the imprisonment of their most popular leader by the Indian State, in the words of Radha

Kumar, "surprised both India and Pakistan by cooperating with Indian troops to repel the guerrillas."[18] Similar to 1948, it was the active support of the Kashmiri people which forestalled Pakistan acquiring Kashmir, a fact the Hindu Right has contumaciously ignored.

As this is not a book on the rights and wrongs of Kashmir, I do not propose to deal with the events post the eviction of the Russians from Afghanistan and the cynical manner in which the Pakistani establishment used the many spare foreign fighters and Jihadis to intrude into the Valley and foment a situation of violent instability which, after 30 years, Kashmir is still recovering from. The point is that the treatment of the Kashmiri Pandits has been an issue which the Hindu Right have constantly raised, ascribing many killings and ethnic cleansing to the Muslim Kashmiris, which I am not persuaded is justified. This has all culminated in an extraordinarily incendiary piece of propaganda masquerading as a film called '*Kashmir Files*' which shows the Pandits fleeing because of genocidal violence in the early 1990s in the most luridly grotesque terms. This alleged genocide does not square with these facts released by the District Police Headquarters of Srinagar in response to an RTI posed in 2022 which plainly stated that the Kashmiri militants had killed around 1,724 people in Jammu & Kashmir since the inception of the militancy in 1990, of which 89 were Kashmiri Pandits—the balance were of other faiths. There were admittedly four prominent Pandits who were killed—T.N. Tipoo, BJP and RSS leader, Lassa Koul, Srinagar Doordarshan Director, Sheela Tikoo and Justice Ganjoo (who had pronounced the death sentence on Maqbool Butt). Three of these killings were politically motivated and not because they were Kashmiri Pandits.

The issue of why so many Pandits migrated out of Kashmir is a complex one, but the malevolent role of Jagmohan, the then Governor, has often been cited encouraging the migration. It is undoubtedly true that over 300,000 Pandits left the Valley in 1990, but to ascribe this to imaginary mass killings and genocide is unfounded. It is equally true that successive Governments over the years have not seriously attempted to rehabilitate the Pandits back in the Valley, something perplexing given the size of India's military commitment to the Valley.

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# PAKISTAN AND THE INDIAN MUSLIMS

The 1965 war had serious implications on Indo-Pak relations, causing the Indian Government to view Pakistan as a hostile State. This, unfortunately, had ramifications on India's large Muslim population. Post 1964, with the demise of Nehru, India's Muslims had lost someone they saw as a genuine friend and protector. The hostility consequent on this unnecessary war collapsed into distrust for Muslims and was injurious to India's large Muslim population. A product of this was the passing of the Enemy Property Act, 1968, where properties identified as having some Pakistani interest were attached and the custody of which was assumed by the Custodian of Enemy Properties. As of 2018, the State has legally appropriated these properties. Attaching enemy property in times of war is not unusual; what is exceptional is that this law persisted indefinitely after the end of hostilities and has now metamorphosed into an instrument of acquisition. It is an act of collective punishment, in most cases affecting Indian Muslims who chose to stay back. Given the nature of heirship under the Sharia, there were bound to be some properties which had an enemy interest by a family member who may have migrated to Pakistan, making such property liable to attachment.

The Enemy Property Act of 1968 was a legislation which followed the abolition of Zamindari in 1951, a legislation which disproportionately affected the Muslims of UP despite Nehru assuring Muslim rajas and taluqdars,in the words of Saeed Naqvi, "that zamindari abolition would not follow so soon after the trauma of Partition. Even the smaller landlords felt reassured by this promise, only it turned out to be false."[1] This is not to say that land reform was not a laudable step, but in the context of Partition, the disruption of properties and businesses, led to the Muslim community feeling besieged. If the abolition of the Zamindari disproportionately hit the Muslims of UP, the arbitrary and in some cases corrupt conduct of the custodian of Evacuee Property towards them disturbed Nehru, causing him to remark in 1949 "I have been upset about many things, but these recent developments in regard to Muslims, evacuees or others, have come as a great shock to me."[2]

It is extraordinary that the Pakistani establishment had never considered the interests of the Indian Muslims as important to formulation of Pakistani policy, adopting an unremittingly hostile attitude towards them. There was never any question of physical accommodation in Pakistan, given the size of the Indian Muslim population, but, at least, if the countries had good relations, the opportunity for the Hindu Right to maltreat India's Muslims on the pretext of Pakistan's delinquencies and excesses would have been considerably reduced.

The exceptionalism of the West Pakistanis and Punjabi military in their attitude to Bengalis was evident by the same token, to Indian Muslims, was no different and had consequences which violently surfaced in 1971. It arose from an ethnic sense of exceptionalism and one which was embedded in a deeply militaristic attitude. Many of the Punjabi Muslims bought into this notion of the martial race and considered Muslims from the East and UP as weak and inconsequential.

There was an underlying unease of the Pakistani elite '*qua*' India, substantiated by the 1971 war and India's assistance to the secession of East Pakistan to becoming Bangladesh. It was unfortunate that India was compelled to become mired in this episode, one which provided much grist to the mill of the Pakistani military hawks and

credence to the narrative of India's perfidious intentions. The fact though was that the genocidal conduct of the Pakistani army in East Bengal towards the local population, many of whom were Hindus, caused an exodus to India and left the Indian Government with no alternative but to prevent a genocide. In fact, prior to 1971 it suited the interests of India to maintain the status quo, as Pakistan was dependent on the Indian landmass for transportation and logistics between its two wings. The Bengali influence politically was a corrective to the palpably anti-Indian mindset of the predominantly Punjabi army. In retrospect, this third Partition was destined to happen, given the superior attitude of the West Pakistanis who looked down with condescension on the Bengalis, treating them as culturally inferior and as less authentic Muslims than them.

In any event, what was evident was what has been described as an organic collaboration between a Punjabi dominated bureaucracy and army on the one hand, and the Punjabi landed families on the other. Punjab being a major recruiting centre for the Indian army, according to Tan and Kudaisya: "One of the outcomes of this association was the militarisation of the administration of the Punjab, characterised by the conjunction of the military, civil and political authorities into a unique civil-military regime."[3] This was a precursor to the embedded role of the army in civilian administration which sadly continues to this day.

After 1971 and the loss of East Pakistan, the two-nation theory was discredited beyond repair. If there was any doubt, the appalling treatment meted out to the Urdu-speaking Biharis stranded in Bangladesh after the 1971 war by Pakistan's vicious refusal to accommodate them in the self-proclaimed Muslim homeland epitomizes this insouciance towards the suffering and displacement of fellow Muslims by the Pakistani establishment. No such hesitation was shown to the Afghan refugees streaming across the border into refugee camps as a consequence of the Russian invasion in the late 1970s as that was with the army's benediction. Such brutal inhumanity was recently displayed by the dramatic overnight expulsion of Afghan refugees in 2023 by the Pakistan Government, many of whom were born in Pakistan and have no tangible connections with Afghanistan.

The 1971 catastrophe caused the Pakistanis to rethink the nature of their Islamic identity, and to this extent, a new fetish surfaced with a faux sacrality afforded to Kashmir. As Farzana Shaikh puts it, "Kashmir was recast as sacred territory awaiting liberation through jihad—thus authenticating Pakistan's identity as the protector of Islam."[4] It is for this reason that the Pakistani establishment is so fixated with Kashmir as it reaffirms an Islamic identity. For more mundane reasons, it also gave the army license to interfere and take control of the Indo-Pakistani discourse, setting the ground rules, the underlying assumption being that there can be no peace without the resolution of Kashmir. This in turn meant that the army has ensured to itself a disproportionate share of the resources of the State on the fiction that Kashmir is the battleground and that the army has to be in a state of constant military preparedness.

If Zulfiqar Ali Bhutto was the wily and opportunistic operator responsible for hitching Pakistan's star to China, as well as creating conditions for entrenching the poison and toxicity of Partition, his assassin and successor General Zia-ul-Haq was worse. He sought to reshape a largely feudal and Sufi society in the image of a South Asian Saudi Arabia, but without the oil. He belonged to the *Jamaat-e-Islami* persuasion and had the overweening desire to impose Sharia law on Pakistan which he did through the '*Hudood*' laws imposing barbaric punishments. This law was of symbolic effect as it was rarely used in practice, its ostensible purpose being to banish and efface all vestiges of modernity, secularism and democracy. General Zia, behind a jovial Terry Thomas visage, harboured the most regressive mindset, proclaiming that if Islam was not pivotal to the creation of Pakistan, then "we might have stayed with India." For the first time in Pakistan's brief history, an Islamic ideologue was in power with untrammelled authority to impose his will and to create and mould the bureaucracy and judiciary under the rubric of Islamicisation. He had 11 years to carry out his mission until he died in a mysterious air crash in 1988 caused, most likely, by a bomb hidden in a crate of mangoes.

The legacy of General Zia was not just the injection of a particularly virulent strain of Islamicist thinking into the body politic, but, significantly, in making Pakistan's strategic geographic

location a source of revenue and monetising it by renting it out to global actors, such as the Americans in the 1980s and the Chinese today, particularly in relation to the Belt and Road initiative.

However, the damage had been done. Pakistan has been in gradual decline from this period, and that is demonstrated in the abysmal spending on human manpower skills, development, expenditure on science and technology after the hegemony of religion, extirpating rationality. The GDP expenditure on the military exceeds 26%, and this is probably a gross under estimation, as there are other budget items such as pensions which are disguised. What is extraordinary is the extent to which the military assets of the Pakistani army have grown —115% between 2011 and 2022, yielding an annual income of over US$ 2.7 billion. The Pakistani army has huge investments in real estate, the food processing business, clubs, transportation, logistics, etc., and they are given preferential tax benefits. Yet the finances of the country are in a dire condition, reducing it to a mendicant state, having to borrow from the Saudis, the World Bank and others.

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# THE PLIGHT OF THE INDIAN MUSLIMS

In a real sense, the Indian Muslims were the orphans of Partition. Their political leverage had ceased to have any traction; they were stripped of separate electorates and reserved positions post-Independence when Pakistan was cynically presented as a gift to the Muslims of India, and having 'given' them that, there were no further reasons to indulge them. The Left of the Congress party busied itself with what it saw as reform of Hindu society, the Right of the Congress party sought to obstruct or undermine such reforms. The Muslims were largely left to fend for themselves.

One of the intractable problems is that Muslims are viewed by the majority community, particularly in the North, solely through the prism of religion and this, in my view, is the origin of their stigmatised citizenship. Where does this perception come from? In North India, we have to go back to the Khilafat Movement as being the seminal event in Hindu-Muslim relations prior to Partition, and this movement was strangely integral to the nationalist movement.

The Khilafat Movement was the most problematical of events for the Muslim community of India, as it brought into sharp focus the divide between the one set of Muslim thinkers such as Sir Sayyid Ahmed, who saw the future of the Muslims in India tied to the continuance of British rule, and those Muslims who were of an

incorrigibly anti-Western mindset and religious disposition who regarded colonial rule as an affront to them. This was the obvious demarcation. But within the community there was also an emerging Western-oriented middle class which may have been politically and numerically inconsequential, but with leaders such as Jinnah, they had a spokesman who was a nationalist but was also chary of dabbling in religion and global Islam, as he saw this as intrinsically fraught with danger. There is a larger controversy which this issue opens up: what was the relationship between Indian Muslims and global Islam? This is an issue which has not quite been resolved.

I say this because much of the wellsprings for the insidious Islamophobia which regrettably has framed the narrative in today's India owes its origins to the West. It is fair to say that other than the Kashmir dispute and Pakistan's involvement through surrogates, this Islamophobia is a consequence of a peculiarly Western viewpoint which is manifest in media coverage and the narrative of the new Right. The ideas of historians such as Samuel Huntingdon gained traction from the various random acts of violence and terrorism committed by discontented Muslim groups in the West and the Middle East in configuring a new enemy post the Cold War. However, as the Khilafat Movement has been identified by some as the root of Partition, leading to surcharging political Islam, and ultimately the Lahore Resolution, this is a very serious charge and one which should be addressed.

At one level, it was opportune for the Congress Leadership under the Mahatma to raise the issue of the support to the beleaguered Ottomans as they were at war with the British empire; and the fact that they were guardians of the holy places, Mecca, Medina and Jerusalem, gave a legitimacy to the Caliphate which transcended everything else. It was an easy and obvious way to garner support amongst the religious Muslims of the sub-continent and to win them over to the Nationalist movement without conceding much in practical terms. It was also significant in that it brought communities together, both Hindus and Muslims, on one nationalistic platform. As Professor Akeel Bilgrami put it, this movement was "a genuinely pluralistic and inclusive movement against imperial force,"[1] and the Khilafat Movement allowed for a mass contact movement amongst

Muslims to garner their support for the Nationalist movement in an idiom they could understand. The immediate consequence of the Khilafat Movement was to alienate Jinnah from the Congress. It would be some years before this formal separation occurred, but ironically, in the light of Jinnah's future political trajectory, he was genuinely disturbed by the unwelcome intrusion of religious tropes and slogans such as 'Islam in danger' in the then civilised political discourse which was monopolised by the upper echelons of Muslim society. Bilgrami argues that there was, in any case, no authentically Indian secularism at least as understood in the West at that time, and to blame the Khilafat Movement for introducing the controversial element of religion into politics was fanciful and historically incorrect. In arguing this, Bilgrami is broadly speaking accurate. In support of this argument, one can allude to Tilak's promotion of the Ganesh festival along the lines of the Muharram Taziya processions in Maharashtra as a catalyst for energising the masses.

A counter to this argument is that the Khilafat Movement was something of an egregious distraction. It distracted the Muslims of UP, for example, from seeking to defend the pluralistic culture which was the only way the communities could truly coexist, channelling their energies into a cause which, by 1918, was already lost and one irrelevant to their lives. It also caricatured the community as one owing fealty to a foreign sovereign, the Ottoman Caliph, and thus being potentially disloyal to India. It was this aspect that perhaps prompted Savarkar to distinguish Indian Muslims and Christians from Hindus on the basis of where they owed their religious allegiance.

### *The Demise of the Cultural Muslim*

My own take on this is that the Khilafat Movement may well have been inclusive and pluralistic at the time, but it had resonance only because of the spectre of colonial oppression —it was aimed against the common enemy. But for the future, it did not bode well for Muslims as it reduced them as a community to one in which religious demands were not only as paramount, but for Hindu politicians, their sole demands. This had several advantages to many Hindus, as it ghettoised the Muslims, confining them to only religious demands

which could not seriously prejudice Hindus, other than the retention of their personal laws which purportedly posed an obstacle to the chimera of a UCC. Thus, cultural rights and economic rights of Muslims were not taken seriously: for example, the retention of Urdu as an official second language in UP was disregarded, it was reduced to the status of a third language after Hindi and Sanskrit.

This had itself important implications for the leadership of the Muslim community. In general, the growth of Westernisation and English learning in India had the effect of detaching many of the elites from the masses amongst all communities. In most cases, this process secularised the elites, in that religion became a personal matter, if it mattered at all. So, you had the phenomenon of the secular Muslims, what we can describe as the 'Cultural Muslims', who were not very different from Hindus, Christians and Sikhs of their class and education in their outlook, believing in rationalism, progress and equality. In this way, they sharply differed from many of their poorer and less cosmopolitan brethren who took pride in their identity and religion and wore it on their sleeves. The difficulty the Cultural Muslims encountered was that the political agenda for secularism had metamorphosed into the straitjacket of cultural uniformity as part of 'nation building.' However, when it came to religious demands, these did not affect the majority community, so politicians bought votes relatively cheaply and kept the Mullahs happy. The Cultural Muslim was seen as elitist and irrelevant, the Fundamentalist given prominence.

In fact, this caricature of a community became even more pronounced with the expanding employment opportunities in the Gulf from the 1970s and the growing influence of the Wahabi strain of Islam on many poor Muslims. Imported from Saudi Arabia, it is an aridly puritanical version of Islam, pointedly looking down on what they categorise as un-Islamic behaviour, such as drinking alcohol, listening to music or engaging in any form of saint worship. In many ways, this dramatised what has been an existential and historical struggle for the soul of Indian Islam between the Deobandis and the Barelvis, the former seeking to Arabise the religion, and the latter, who believe in veneration of the Prophet and Sufiism and Saint worship. It can be seen as an agenda to detach Indian Muslims

from their roots in what was a syncretic culture. The consequence of this Arabisation of Indian Islam was to profoundly contract and reduce the cultural footprint of Muslims, as to be seen as a Muslim was increasingly viewed through a religious prism and one greatly influenced by Wahabi thinking.

If I have raised the issue of the lack of agency of the Indian Muslims, one cannot ignore the blight of the new fundamentalist ideologies which have been imported from the Middle East in which religion is not only ritualised, it is reduced to what has been described as the "objectification of Muslim consciousness."[2] It purports to provide "a self-contained system that its believers can describe, characterise and distinguish from other belief systems." Much of these writings refer to anecdotes from the life of the Prophet and his companions which believers are called upon to emulate. The purpose of this is to identify with the imagined persona of the Prophet and that era; it is irredeemably revanchist in character. This atavistic thinking infects the community in terms of their attitudes and priorities as well as creating a chasm with the majority community.

The danger is that the believers are drilled into thinking that the temporal world is a mere illusion and detracts from the practice of true religion. Such an attitude influences future outlook. For a society and for people to attain success requires not just acquisition of education and practical skills, but a belief in a future which will involve planning and a sense of the long term. Admittedly, there are societies such as Israel and Saudi Arabia which are rich enough to fund large numbers of people who wholly devote themselves to religious practice at the cost of their livelihoods. This is not an option for many Indian Muslims, but unfortunately this anti-materialist sentiment combined with a disdain for Western education conspires to keep the community backward.

One of the effects of this typecasting of Muslims as essentially religious beings having no claims on modern society, other than being left alone to practise their religious beliefs, was to diminish the role and influence of the Cultural Muslims who were seen not just by the Mullahs but even by the majority community as not really authentic Muslims. This leads to the unspoken assumption that there are real Muslims and fake ones, and that the latter should have no real

say in the future of the community. This fate is not uncommon, as other religious communities have also suffered from this suffocating attitude—the Jews spring to mind. In a biography of Sir Isaiah Berlin, there is a passage which is worth repeating.

> One Jew would find his identity in Israel, another in Britain; one would find it in religious faith, another in keeping to Jewish customs, and still another in abandoning Judaism altogether. It was a form of intellectual tyranny to suppose that one of these choices must be right for everyone. Were the claims of religion and tradition to prevail over an individual's right to shape his life as he wished, Jews would only substitute the self-imposed slavery of their own community for the Gentile-imposed slavery they had endured for millennia.[3]

I think this quotation is poignant and hugely relevant to Muslims today as it acknowledges the autonomy of Muslims to do as they wish. This autonomy is granted to persons who belong to other religions, so why is it denied to Muslims?

The cultural Muslim is unfortunately identified as the elite Muslim, but traditionally that has been far from the case. If one examines North Indian culture, one sees the extraordinary contribution the Muslims of North India have made, whether it be handicrafts, textiles, art, literature, drama, poetry, classical and folk music, the culinary arts or cinema. With Partition, one sees the rise of fundamentalism and a decline in this contribution. It is as if the narrative that Muslims are necessarily labelled as religious beings who are forbidden from participation in the arts is being taken seriously. And that is not just a loss for Muslims, it is a diminishment of our culture.

### *The Rise of the Religious Right*

The prominence of the All India Muslim Personal Law Board (AIMPLB) has assumed the leadership of the Muslim community in the North as a consequence of the *Shah Bano* case and the Ayodhya dispute. This self-appointed body purports to represent the interests of the North Indian *Ashraf*, the traditional upper-class Muslim

north India elite, and to a large extent the *Shah Bano* judgement gave legitimacy to this body as interlocutors who were able to protect Sharia law from any reform or interference from a secular Government. It also buttressed the narrative that all that Muslims were interested in were religious matters, such as preserving Sharia law and safeguarding mosques. This narrative was hugely damaging to all Muslims in the long run, as Professor Devji observed, "they generally held up holding Muslims in different parts of the country hostage to North Indian concerns, and thus shut down political diversity within the community."[4] The AIMPLB, in it's attempts to protect Sharia and the Babri Masjid, played into the hands of the Hindu Right, as it projected a united Muslim coalition of interest at an all-India level which only instigated the consolidation of a much larger Hindu coalition. This transformed the political discourse in the country, bringing Hindu nationalism to the forefront.

The question of the treatment of Indian Muslims by the majority community is viewed through the prism of an indulgent majority having to deal with a recalcitrant minority who stubbornly do not wish to 'integrate,' who stand out representing their atavism with their dress, their excessive religiosity and clinging to their personal law. The Sachar Committee Report on the state of the Indian Muslims has been an eye opener as to the extent of the backwardness and poverty of the community. Perversely, this view has been used by the Hindu Right to blame the secular Congress for this state of affairs without offering an alternative vision.

I have placed the plight of the Indian Muslims in the context of the sub-continent, as I think that is the only sensible way of understanding their problems. In this regard, the focus is unapologetically on North India and the Deccan, as there is a historic continuum. It is not possible to detach Partition and its aftermath from their present fate, whether it be the separation of families, the migration of the best and brightest, the stigmatised citizenship and a besieged culture. These factors cannot be disregarded along with burgeoning Hindu triumphalism and attacks on peculiarly Muslim businesses, such as the butcher's trade and leather business through draconian cow slaughter laws. The tentacles of the Enemy Property Act extended to the landed Muslims and the stubborn refusal to give reservations

to Muslim Dalits, and the Scheduled Castes exhibit the desire to discriminate and prejudice Muslims of all classes. These concerns are only exacerbated by the slow but inexorable disappearance of the Muslim voice in the political space and its absence in the media, except for the dwindling Urdu press.

In fact, the Hindu Right's narrative has far greater purchase, viewing India's Muslims as disloyal to India, pro-Kashmiri, demanding special status as minorities, refusing to accept a UCC and thus undermining national unity. So much so that the image conjured up typically portrays the Hindus as besieged in their own country by a demanding, disloyal and ungrateful minority who, according to many, should not be here in the first place: they should all be in Pakistan.

Nirad Chaudhari states that he always thought of the Poles as being the unhappy people but that "I do not consider that even their fate has been tragic as that of the Muslims of India."[5] Today most people look at their economic and social conditions and despair. But for Indians of an earlier generation, it only reflects part of their contemporary destitution. Sudipta Kaviraj puts it well when he observes that,

> as a community the Muslims suddenly lost their status as a culturally and socially leading group, forced unjustly to be on the defensive, despite Nehru's attempt to celebrate their decision to stay as a triumph of secularism. Once they had been among the groups which used to dominate society; now they had to be protected by the state.[6]

This is a very insightful observation but does not quite capture the true extent of their denigration and their decline as, along with the community, their culture has sought to be banished and effaced in school textbooks.

It is often forgotten that the Muslims, particularly those from Bombay, played a significant role in Indian nationalism, such as Badruddin Tyabji, the first Indian President of the Congress, and before him the Ali brothers, Abdul Ghaffar Khan, popularly known as the 'Frontier Gandhi,' and many others who sacrificed themselves for the cause of India's freedom. The Muslims of India have also distinguished themselves in commerce, the 'Khoja, Memon and

Bohri' communities from Gujarat have not only established thriving businesses in India, but in Africa and in the Far East.

The cultural contribution of Muslims has been immense in music, art, theatre, films, education and handicrafts, including textiles. This cultural contribution has had a major knock-on effect in terms of popular culture, such as Indian cinema, in terms of film production, scriptwriting and music, particularly during the Golden Age. I state this only to show the degree to which the Muslim community have sunk, and the current Government are only interested in degrading them further.

For a population of over 200 million, the fact that the number of Indian Muslims who have joined extremist organisations is minuscule is one which the Indian establishment should take comfort in. Instead, it pointedly chooses to ignore this as it does not align with the establishment narrative. India is probably the only country in the world which, despite having a largely docile Muslim minority population, is transfixed by an imaginary existential threat of Muslim fundamentalism. So much so that it acts as the lightning rod of its foreign policy almost to the point of collective paranoia. This fear and trepidation is apparent on the news and television where nary a day passes without reference to dredging up some Islamophobic reference, some stray incident in Kashmir to show Pakistan's perfidy. One would imagine that there were no other problems in India save for being the target of international Islamic terrorism, the only spoiler in an otherwise trouble-free existence.

### *The Condition of the Indian Muslims*

Whilst it is true that from the period post-Independence to around 2001, there were instances of episodic violence between Hindus and Muslims, with riots and massacres including those in Hashimpura in UP, Nelli in Assam, Bhagalpur in Bihar in 1989, the Bombay riots in 1992, the Gujarat riots of 2002 represented an unsettling new and sinister twist in the 'confrontations.' In the past, all riots and massacres involved cover ups, with some degree of political choreography and complicity by the police in attacks on the minority communities, whether it be Muslims or Sikhs. But the Gujarat

conflagration brought in a new dimension with the allegation that there was a Pakistani involvement in the death of the pilgrims who were returning from Ayodhya. The allegation that *Lashkar-e-Taiba* was involved is bereft of any tangible evidence but transformed a quotidian Hindu-Muslim clash into one which the Indian State is pitted against an international evil jihadi conspiracy warranting violent retribution on local Indian Muslims by way of collective punishment by vigilantes and non-state actors. This is the Kashmir playbook, the Putin playbook in Chechnya as well as the Israeli one.

It is also material that Muslims feature disproportionately amongst imprisoned undertrials; in UP, for example, the number of Muslims facing criminal charges in proportion to their population should be 19%, yet those languishing in prison are around 27%, which is anomalous.

The plight of young Muslims has recently been shown dramatically in an All India Survey of Higher Education. In comparison with the Dalits, Adivasis and OBCs, the enrolment of Muslims students dropped by 8% since 2019–2020. Interestingly, the decline is most pronounced in UP, around 36%, 26% in Jammu & Kashmir, and even states like Delhi have shown an absolute decline of Muslim enrolments by as much as 20%. This can be contrasted with traditionally backward communities, like the Dalits, whose enrolment has increased by 4.2%, the Adivasis by 11.9% and the OBCs by 4%. Interestingly, states in which Muslims are given reservations both in jobs and higher educational Institutions, such as Kerala, which affords 10% reservations in government jobs and 12% in educational institutions, show a more positive trend. Christophe Jaffrelot ascribes this disturbing trajectory to the rise of Hindu majoritarianism in terms of discrimination as regards jobs, as it is almost worthless to acquire an education without the prospect of gainful employment. He also attributes this situation to the increase in day-to-day violence towards Muslims, forcing them into ghettos in most Indian cities. He bases this view on research conducted showing that CVs with Muslim names attracted the least interest.[7] His conclusion is that what we are witnessing is the manufacturing of second-class citizens and that does not bode well for social harmony.

Professor Ali Khan Mahmudabad observes that the "lethal combination of political, institutional, legal, economic and social exclusion promises to sow the seeds for a conflict that will destabilise India for the years to come."[8] He also points out that nearly 50% of the Muslim population is below 19 years of age, and that there will be consequences for this young community, who are growing up in an atmosphere of 'hate and intolerance,' and as a generation will have known nothing but exclusion and alienation. With the BJP taking Indian politics to the Right, it is more than likely that young, alienated Muslims will not look to the secular opposition as their role model to oppose the BJP, they may very well look to Muslim extremism for succour. Yet the majority community is insulated from any blame; in fact, the argument has been that the real problem has been the excessive indulgence shown by the majority to the minority. This is one of the reasons that post 2014, India has elected a Government and party which cannot be accused of such misguided policies. The Muslims have been shown their place.

The problem with this fetish with Islamic fundamentalism is that it borrows much from the Western narrative, seeing the problem as being integral to Islamic thought, such as jihad which justifies terrorism and violence, rather than seeing this fundamentalism in the context of the twenty-first century. It is important to note that even Jihad was given prominence only in the twenty-first century according to Professor Devji, in his incisive study of militant Islam, and he makes the point that "local forms of Islamic militancy are… increasingly mediated by global conditions rather than the other way round."[9] This argument is further reinforced by a brilliant work by Suzanne Schneider in which she examined jihad not in the context of some historical continuum from the seventh century, but arguing that one has to look "sideways at the contemporary word."[10] This is necessary as it upends the Western narrative which views Western violence, which we have witnessed in Iraq and Gaza, as being rational and proportionate, as distinct from jihadi violence, which is terrorism.

The only way forward is for the Muslims of North India to discard the fetish with outdated interpretations of the Sharia and to recover their agency through more calculating and self-interested

political alignments, as we have seen in the South. The BJP have been promising assistance for what are called Pasmanda Muslims, those Muslims that have been left behind, for whom the BJP has done little. Yet at the same time, this may be a political dead end as it may involve nominal reservations on the basis of caste; but as we have seen in relation to the OBCs, it is not as if these reservations guarantee outcomes.

A more promising avenue is the demand to reform the Waqf laws, as Professor Devji has pointed out that Jinnah's reform in 1937 had created the opportunity for a system whereby wealth could be accumulated within the family to mirror the HUF, so the property would not be divided according to Sharia laws of inheritance. The Muslims need to move a step further and reform the family Waqf into a family Trust, one that aligns with modernity in that it does not tie up property indefinitely. These are some pointers for a future which otherwise looks uniformly dismal.

However, absent a political voice in a political system driven by majoritarian thinking, the Muslims have little or no political recourse, as India is fast ceasing to be a political society and is becoming an authoritarian one. Let us go back to ancient Greece, when in 416 BC Athens attacked Melos, whose inhabitants sued for peace. Thucydides famously described the Athenians' response as "the strong do what they can and the weak must suffer what they must."[11] This, regrettably, is the plight of the minorities in the matrix of the new nationalism.

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